No. 02-5034-CFY Title: Tuyet Mai Thi Phan, Petitioner
v.
United States

Docketed:
July 1, 2002

Court: United States Court of Appeals for the Ninth Circuit

Vide:
01-10873

Entry	Date	Proceedings and Orders
	Jun 18 2002	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 30, 2002)
	Jul 8 2002	Waiver of right of respondent United States to respond filed.
	Jul 11 2002	DISTRIBUTED for Conference of September 30, 2002
	Jul 31 2002	Response requested. (Due August 30, 2002)
	Aug 20 2002	Order extending time to file response to petition until September 30, 2002.
	Sep 30 2002	Brief of respondent United States in opposition filed. VIDED.
	Oct 10 2002	REDISTRIBUTED for Conference of November 1, 2002
	Nov 1 2002	Reply brief of petitioner Tuyet Mai Thi Phan filed.
	Nov 4 2002	Petition GRANTED. These cases are consolidated and a total of one hour is allotted for oral argument. SET FOR ARGUMENT March 24, 2003.
		**********
	Dec 11 2002	Order extending time to file the joint appendix and petitioners' brief on the merits to and including January 3, 2003.
	Jan 3 2003	Appendix of petitioner filed. VIDED.
	Feb 3 2003	CIRCULATED.
	Feb 5 2003	Order extending time to file respondents' briefs on the merits to and including February 21, 2003.
	Feb 6 2003	Record filed.
	Feb 12 2003	Record filed.
	Feb 21 2003	Brief of respondent United States filed. VIDED.
	Feb 21 2003	Brief amicus curiae of Thomas K. Moore filed. VIDED.
	Mar 12 2003	Letter from the Solicitor General received and distributed.
	Mar 13 2003	Motion of petitioner for appointment of counsel filed.
	Mar 17 2003	Motion DISTRIBUTED. March 21, 2003 (Page 28)
	Mar 17 2003	Reply brief of petitioners Khanh Phuong Nguyen and Tuyet Mai Thi Phan filed. VIDED.
	Mar 24 2003	Motion for appointment of counsel GRANTED and it is ordered that Rawlen Mantanona, Esquire, of Hagatna, Guam is appointed to serve as counsel for the petitioner in this case.
	Mar 24 2003	ARGUED.

ORIGINAL

No. 02-5034 (2)

Supreme Court, U.S.
FILED
JUN 18 2002
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

TUYET MAI THI PHAN — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

UNITED STATES DISTRICT COURT OF GUAM & THE NINTH CIRCUIT COURT OF APPEALS

[ ] Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

(Signature)

RECEIVED
JUL 1 2002
OFFICE OF THE CLERK
SUPREME COURT, U.S.

20pp

ORIGINAL

IN SUPPORT OF MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

02-5034

Supreme Court, U.S.
FILED
JUN 16 2002
OFFICE OF THE CLERK

I TUYET MAI THI PHAM, am the petitioner in the above-entitled case. In support of my motion to proceed without being required ~~to prepay fees.~~ costs, or give secuirty therefor. I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceedings in this Court are ture.

1. Are you presently employed? Yes____ NO X
   a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer:

   b If the answer is no state the date of your last employment and the amount of salary or wages per month which you received.

   I have not worked in 10 years outside the home.

2. Have you received wihin the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources?

   Yes____ No X

   a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or have a checking or saving account? Yes____NO X.

   a If you answer is yes, state the total value of the items owned.

4. Do you won nay real estate, stocks, bonds, notes, automobiles, or other valuabel property (exclusing ordinary household furnishings and clothing) Yes_____ NO X

   a If the answer is yes, describe the property and state its approximate value.

4. List the persons who are dependent upon you for support and state your relationship to those persons. None.

   I declare under penalty of perjury that the foregoing is true and correct.

   Executed on June 17, 2002

   TUYET MAI THI PHAN,

ORIGINAL

No. 02-5034

Supreme Court, U.S.
FILED
JUN 16 2002
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

TUYET MAI THI PHAN — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

TUYET MAI THI PHAN #01973-093
(Your Name)

UNIT E, FCI CAMP PARKS 5701 8TH STREET
(Address)

DUBLIN CA. 94568
(City, State, Zip Code)

NONE
(Phone Number)

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QUESTION PRESENTED

Was the Ninth Circuit's judgment vitiated by the participation of a non-Art. III judge?

LIST OF PARTIES

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

KHANH PHUONG NGUYEN APPELLANT NO: 00-10353 Petiioner, one of two defendnats-appellants.

Respondent United States of America Plaintiff-appellee (Nos. 00-10353 and 00-10406):

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NO.

SUPREME COURT OF THE UNITED STATES

October Term, 2001

TUYET MAI THI PHAN,

Petitioner,

vs

UNITED STATES OF AMERICA

Respondents

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner, Tuyet Mai Thi Phan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this cause on March 25, 2002.

OPINIONS AND ORDERS BELOW

The opinion of the Ninth Circuit is reported at 248 F.3d 1086.No opinion was rendered by the District Court of Guam. No order rendered by the District Court of Guam is reported.

JURISDICTION

The judgment sought to be reviewed was entered on March 25, 2002.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question on a writ of certiorari is 28 U.S.C. §1254(1)

CONSTITUTIONAL PROVISION AND

STATUTES INVOLVED

U.S. Const. art. III, § 1

The Judges...of the...inferior Courts, shall hold their Offices during good Behavior....

28 U.S.C. § 43(b)

Each court of appeals shall consist of ...circuit judges....

28 U.S.C. § 44(b)

Circuit judges shall hold office furing good behavior

28 U.S.C. § 132(b)

Each district court shall consist of the district judge...for the [judicial] district....

28 U.S.C. § 133(a)

The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts as follows:

Districts	Judges
....	
North Dakota	2
Ohio	
Northern	11
Southern	8

28 U.S.C. § 134(a)

The district judges shall hold office during good behavior.

28 U.S.C. § 292(a)

The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.

48 U.S.C. § 1821(b)(1)

The President shall, by and with the advice and consent of the Senate, appoint a judge for the District Court for the Northern Mariana Islands who shall hold office for a term of ten years and until his successor is chosen and qualified, unless sooner removed by the President for cause. The judge shall receive a salary payable by the United States which shall be at the rate prescribed for judges of the United States district courts.

THE CASE

Tuyet Mai Thi Phan was conviced of offenses against laws of the United States in the District Court of Guam. (ER.100.) The basis for federal jurisdiction in the district court was 18 U.S.C. § 3231 and 48 U.S.C. **§ 1424(b)** Pham appealed to the United States Court of Appeals for the Ninth Circuit. (ER107)

The conviction was affirmed. (284 F.3d at 1087, 1091) The panel which heard and determined the appeal consisted of two circuit judges and the judge for the District Court for the Northern Mariana Islands, "sitting by designation.' (284 F.3d at 1087 n**.)

REASON FOR GRANTING WRIT

THE NINTH CIRCUIT"S JUDGMENT WAS VITIATED BY THE PARTICIPATION OF A NON-Art. III Judge

Ninth Circuit panels are made up of Art. III judges. U.S. Const, art. III, § 1, provides, "The Judges...of the...inferior Courts, shall hold their Offices during good Behavior...." "Each court of appeals... consist[s] of...circuit judges...." (28 U.S.C. §43(b).) "Circuit judges-...hold office during good behavior." (28 U.S.C. § 44(b) "The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires." (28 U.S.C. § 292(a).) "[D]istrict judges...hold office during good behavior." (28 U.S.C. §134(a).) (E.g. 28 U.S.C. §§ 252 ("Judges of the Court of International Trade shall hold office during good behavior"), 293(a) (designation and assignment of judges of Court of International Trade to courts of appeals).) No statute authorizes the designation or assignment of a non-Art. III judge.

The judge for the District Court for the Northern Mariana Islands is not an Art. III judge. For example, he does not hold office during good behavior. Rather he "hold[s] office for a term of ten years and until his successor is chosen and qualified, unless sooner removed by the President for cause." (48 U.S.C. §1821(b)(1).) Also, despite the Ninth Circuit's characterization "District Judges for the District of the Northern Mariana Islands" (284 F.3d at 1087 n.**), the judge for the District Court for the Northern Mariana Islands is not a district judge. "Each district court... consist[s] of the district judge... for the [judicial] district...." (28 U.S.C. § 132(b).) The judicial districts are listed in 28 U.S.C. § 133)a), and the Northern Mariana Islands is not one of them.

Phan was entitled to a hearing before a properly constituted panel. (See Ryder v United States, 515 U.S. 177, 188 (1995) (Court of Military Appeals erred in according de facto validity to actions of civilian

judges of Coast Guard Court of Military Review).) The Ninth Circuit's judgment was vitiated by the participation of the judge for the District Court for the Northern Mariana Islands. (Cf. Glidden Co. v Zdanok, 370 U.S. 530 (1962) (judgments in United States District Court and United States Court of Appeals not vitiated by respective participation of judges of Court of Claims and Court of Customs and Patent Appeals, becau latter are courts created under Art. III, and their judges may validly serve on United States District Courts and Courts of Appeals).) This Court should be reluctant to sanction the participation of a non-Art III judge. (CF. Guam v Olsen, 431 U.S. 195, 201 (1977) ("we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law").)

CONCLUSION

The Ninth Circuit has so far deported from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. The panel which heard and determined Phan's appeal included a non-Art. III judge. Because of this, this petition should be granted.

Respectfully submitted under the mandates of Haines v Kerner, 404 U.S. 519.

6-17-02
DATED

Tuyet Mai Thi Phan
TUYET MAI THI PHAN Pro Se

(Appendix follows)

UNITED STATES of America, Plaintiff-Appellee,

v.

Khanh Phuong NGUYEN, Defendant-Appellant.

United States of America, Plaintiff-Appellee,

v.

Tuyet Mai Thi Phan, Defendant-Appellant.

Nos. 00-10353, 00-10406.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Feb. 12, 2002.*

Filed March 25, 2002.

Defendants were convicted in the United States District Court for the District of Guam, John S. Unpingco, Chief District Judge, of conspiracy to import methamphetamine, knowingly aiding and abetting importation of methamphetamine, and attempting to possess over 50 grams of methamphetamine with intent to distribute. Defendant appealed. The Court of Appeals, Goodwin, Circuit Judge, held that: (1) evidence of consanguinity connecting defendants' brother and nephew to the defendants was not irrelevant or unfairly prejudicial, and (2) evidence was sufficient to support convictions.

Affirmed.

1. Criminal Law ⇐1153(1)

The Court of Appeals reviews for an abuse of discretion the trial court's evidentiary rulings.

2. Criminal Law ⇐1153(1)

Evidentiary rulings will be reversed for abuse of discretion only if such nonconstitutional error more likely than not affected the verdict.

3. Criminal Law ⇐341

Evidence of consanguinity connecting defendants' relative to the defendants was not irrelevant or unfairly prejudicial, in prosecution for conspiracy to import methamphetamine, knowingly aiding and abetting importation of methamphetamine, and attempting to possess over 50 grams of methamphetamine with intent to distribute; relative's driver's license bore same address as return address on package containing methamphetamine received by defendants, possession of driver's license by relative was verified by police records, which tended to prove that defendants did not just accidentally pick up and open package mailed by mistake from unknown stranger. Fed.Rules Evid.Rules 401–403, 28 U.S.C.A.

4. Criminal Law ⇐1144.13(3), 1159.2(7)

There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

5. Criminal Law ⇐1144.13(1), 1159.3(2), 1159.4(2)

An appellate court must respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict.

* The panel unanimously finds this case suitable for decision without oral argument. Fed. R.App. P. 34(a)(2).

6. Conspiracy ⇐47(12)

Drugs and Narcotics ⇐123.2, 124

Evidence was sufficient to support defendants' convictions for conspiracy to import methamphetamine, aiding and abetting importation of methamphetamine, and attempting to possess over 50 grams of methamphetamine with intent to distribute; defendants' relative's driver's license bore same address as California return address on package received by defendants in Guam, defendants dropped package wrapper in refuse container near hospital, both names of sender and receiver on package were assumed names, police found baggies and $6000 case in defendants' apartment, along with five cylindrical objects that formerly contained methamphetamine in the toilet and bathtub, and one defendant's hand had "clue" material planted by police on it to prove that she opened package

Howard Trapp, Hagatna, Guam, for defendant-appellant Nguyen; Kari A. Wickland, Hagatna, Guam, for defendant-appellant Phan.

Mark E. Kondas, Assistant United States Attorney, Hagatna, Guam, for the plaintiff-appellee.

Appeal from the United States District Court for the District of Guam; John S. Unpingco, District Judge, Presiding. D.C. No. CR-99-00158-JSU.

Before: SCHROEDER, Chief Judge, GOODWIN, Circuit Judge and MUNSON,** District Judge.

** The Honorable Alex R. Munson, Chief District Judge for the District of the Northern Mariana Islands, sitting by designation.

GOODWIN, Circuit Judge.

A jury convicted Defendants Khanh Phuong Nguyen ("Nguyen") and Tuyet Mai Thi Phan ("Phan") of drug violations. Nguyen and Phan appeal. We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

BACKGROUND

While conducting a drug detector dog sniff of mail parcels at the Guam Main Postal Facility, Guam Customs Officer Franklin J. Gutierrez, Jr.'s dog "Hooch" alerted to an express mail parcel addressed to Linda Phan, P.O. Box 9104, Tamuning, Guam. Officer Gutierrez obtained a search warrant and took the parcel to the Guam Customs Contraband Enforcement Team Office. A Guam Customs officer X-rayed the parcel, which was found to contain, among other items, five cylindrical objects. An officer then opened the parcel and discovered amphetamine packed in five small canisters. Officers proceeded to replace the crystal amphetamine with rock salt and wire the package so that it would send a radio signal when opened. After restoring the parcel to its original wrapping, drug enforcement agents arranged with the postal agents to make a controlled delivery.

Postal Inspector Pitts arranged for a notice of Express Mail to be placed in post office box 9104. Defendant Appellant Phan retrieved the notice, presented it to a postal clerk, and received the package. Phan signed for the package as "Lin Da Phan." At trial, Inspector Pitts testified that Phan told him that "Linda" was her sister. Phan left the post office with the parcel and got into a car driven by Co Defendant Nguyen's younger sister, Tina.

Ai Ngoc Phan ("Ai") was in the back seat with a two-year old boy, Kevin Nguyen ("Kevin"). Both Nguyen and Phan are related to Tina, Ai, and Kevin, as well as to Kevin's father Thanh Phuong Nguyen, who lives in California.

Agents kept the car under surveillance and followed it to Guam Memorial Hospital where it stopped. An unidentified person in the car deposited something in a refuse container near the Emergency Room. The car then moved to a residential area in Tamuning, ultimately parking at an apartment complex in space number nine. At trial, the government characterized the motor trip as having taken a "circuitous" route.

At the apartment complex, agents saw two women exit the car with a child and enter Apartment number six, which was later identified as the apartment occupied by Nguyen. Agents meanwhile became aware by a radio signal that the package had been opened. The agents then approached the apartments, where they observed Phan near the sliding back door of Apartment nine. Agents testified that they saw Phan walk from her apartment over to Nguyen's apartment.

Without a warrant, the agents entered Apartment six and found Phan and Nguyen in the living room. Agents saw parts of the opened parcel and some of its contents inside the front bedroom. The agents found three cylindrical objects in the bathtub, and two in the toilet bowl. Phan and Nguyen were then advised of their rights, chose to remain silent, and were arrested.

The agents then obtained a warrant and searched Apartment six. They found drug paraphernalia, packaging material, and $6,000 cash.

When the agents had previously repacked the parcel, they had installed a "clue spray" that would be revealed under black light if it later showed up on someone's hands. When arrested, Nguyen's hands bore the tell-tale clue. Phan's hands were clean. Phan was in her kitchen cooking lunch when the package was opened, she says, and there is no evidence to contradict her. Tina, who was not indicted, also had a trace of the clue material on one of her fingers.

The contents of the five canisters, already under government control, were weighed and analyzed and found to contain 443.8 grams of methamphetamine. The hospital garbage can was searched and yielded an express mail container which bore a Westminster, California, postmark dated November 30, 1999, and the following words and figures: (671) 646–2330 (a Guam area code number that was not identified as assigned to anyone) and "To: Linda Phan, Post Office Box 91, Tamuning, Guam 96911." The label also contained the words: "From Michael Tran, 12181 Candy Lane Garden Grove, California," and a(714) area code number that failed to check out as active or valid.

Garden Grove police checked the Garden Grove return address and found no Michael Tran living there. But on December 1, 1999, nearby Santa Anna police interviewed a man named Thanh Phuong Nguyen ("Thanh"), whose driver's license gave the Candy Lane address as the address of the licensee. According to Santa Anna police officer Sergio Camacho, Thanh claimed that he lived at 12181 Candy Lane. Although Thanh did not in fact reside at 12181 Candy Lane, California police officers did locate another, unrelated, Nguyen family that had formerly lived at the Candy Lane address but had recently sold the house.

The interview in Garden Grove would never have been reported to officers in Guam had not police computers turned up the Candy Lane address in the Guam investigation. Other than the express mail wrapper, and Thanh's driver's license, no evidence connected Thanh with the house at 12181 Candy Lane. He did, however, turn out to be Defendant Nguyen's brother, and Defendant Phan's nephew.

On December 15, 1999, the United States Grand Jury for the District of Guam returned an Indictment charging both Nguyen and Phan with (1) conspiracy to import methamphetamine (in violation of 21 U.S.C. §§ 952(a), 960, and 963); (2) knowingly aiding and abetting each other to import methamphetamine (in violation of 18 U.S.C. § 2, and 21 U.S.C. §§ 952 and 960); and (3) attempting to possess over fifty (50) grams of methamphetamine with intent to distribute (in violation of 21 U.S.C. §§ 841(a)(1) and 846).

On the first day of trial, Defendants objected to any introduction of evidence about Thanh's connection to Defendants. The District Court overruled the Defendants' objection, stating that the evidence was relevant because, *inter alia*, the address on Thanh's driver's license was the same as that listed on the return address of the parcel.

On March 29, 2000, the Defendants were convicted on all counts. The District Court sentenced each Defendant to the custody of the Bureau of Prisons for two hundred twelve months on each count, to be followed by a five year term of supervised release.

DISCUSSION

Appellants Nguyen and Phan challenge the admission into evidence of the consanguinity between themselves and Thanh, the holder of the California driver's license bearing the Candy Lane address. Appellants argue that the District Court abused its discretion in admitting evidence regarding Appellants' familial relationship with Thanh. Appellants also argue that the evidence admitted regarding their familial relationship with Thanh was insufficient to support their convictions.

[1, 2] We review for an abuse of discretion the trial court's evidentiary rulings. *See United States v. Hicks*, 103 F.3d 837, 843 (9th Cir.1996). "Evidentiary rulings will be reversed for abuse of discretion only if such nonconstitutional error more likely than not affected the verdict." *United States v. Hankey*, 203 F.3d 1160, 1166 (9th Cir.2000).

[3] Here, the evidence connecting Thanh's driver's license to the return address on the package received by Defendant Phan was relevant and admissible. The tracing of the address on the package label back to Nguyen's brother in California was good police work, and information gleaned from that tracing was competent, relevant evidence from which the jury could infer that the family members in Guam would know from the coded words and numbers on the package who sent it and what it contained. That inference is fortified by the manner in which the person who picked up the package at the post office explained the name "Linda," and the route the package took on its way to the apartment where the defendants were arrested.

Further, the possession of the driver's license by Thanh, at about the time a package bearing the same address was mailed, was verified by police records, photo identification, and finger print records. The use of this evidence by the government, over the objection that it was irrelevant and prejudicial, did not violate Federal Rules of Evidence 401, 402, or 403. The evidence was highly relevant. Of course it was harmful to the defense case, but that is a common function of relevant evidence connecting a suspect to a crime.

Likewise, the evidence that Thanh and Defendant Nguyen were brother and sister could be considered by the jury as tending to prove that Defendant Phan did not just accidentally pick up a package mailed by mistake from an unknown Cali-

fornian to a total stranger in Guam, a theory the defense wanted the jury to believe.

Rule 402 makes relevant evidence admissible, while Rule 403 sets limits on the admissibility of relevant evidence. The appeals make much of Rule 403, claiming that the challenged evidence was of a very low level of relevance and possessed a very high level of prejudice. The defense overstates the proposition both ways. In viewing the challenged evidence in the light of the record as a whole, the level of relevance is high, and the prejudice level is low in comparison to the high probative value of the evidence. The District Court clearly performed the necessary Rule 403 weighing. We conclude that there was no abuse of discretion in receiving the evidence.

We also conclude that the evidence of Thanh's consanguinity with the Defendants, in conjunction with other evidence, was sufficient to support the Defendants' convictions for conspiring to import, aiding and abetting each other to import, and attempting to possess with intent to distribute, over fifty grams of methamphetamine.

[4, 5] There is sufficient evidence to support a conviction if, viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *United States v. Crawford*, 239 F.3d 1086, 1092 (9th Cir.2000). An appellate court "must respect the exclusive province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts, by assuming that the jury resolved all such matters in a manner which supports the verdict." *United States v. Gillock*, 886 F.2d 220, 222 (9th Cir.1989).

[6] Here, the government's theory was that this whole transaction was a family plan involving, *inter alia*, Defendant Phan, Defendant Nguyen, and Nguyen's brother, who, although not indicted in this case, very probably mailed, or caused to be mailed, the incriminating package from California to Phan. Although this court has established that guilt cannot be proven by mere association, *see United States v. Garcia*, 151 F.3d 1243 (9th Cir.1998), the case now before us does not depend on mere association. The evidence connecting the California source of the package to the Guam family contained abundant facts from which the jury could infer that the two family members in Guam knew very well what was in the package when they opened it.

For example, the evidence that Nguyen's brother in California was in possession of a driver's license falsely showing the Candy Lane address to be his own raises the possibility that Nguyen knew when she opened the package that it contained contraband. An innocent Christmas package would not have produced a trip to a refuse container near the hospital to dispose of the wrapper with its tell-tale information that someone known to the relatives in Guam was connected with the mailing of the package bearing that address. The mailing of a package a few weeks before Christmas by a brother in California to a sister in Guam is not surprising, and, by itself is a neutral act. The employment of Americanized assumed names by both the sender and the receiver, while intrinsically innocent, makes the neutrality of the mailing questionable in light of other circumstances to be considered by the jury. Phan's brief argues that she did not understand English very well and was confused. But the jury could believe that the sequence of events proved that Phan was not confused. There was plenty of evidence of intent to import, and of intent to possess, and of a completed attempt to import and to possess, frustrated only by the intervention of the government turning the "ice" into rock salt. And, most importantly, the evidence that the five unopened cylindrical objects were in the toilet and bathtub when the police entered the apartment crates a strong inference that the women knew exactly what was contained in the package. Phan picked up the package, delivered it to Nguyen, who unwrapped it and got the "clue" material on her hands. The picture of two innocent women eagerly opening a Christmas package with no idea of what it contained is tainted by the presence of nearly a hundred little plastic zip lock bags and $6,000 cash in the apartment. In light of the $6,000 in cash, the baggies began to look like containers for whatever the contents of the package may have been divided into. The evidence, which is more consistent with guilty knowledge than with innocence, fits together like so many pieces of a puzzle.

Appellants correctly point out that the evidence was disputed on a number of points that the jury had to consider. For example, the postal inspector testified that, when she picked up the package, Defendant Phan was asked to show ID. She produced a Social Security card, and when asked: "Are you Linda Phan?" said, "No, she is my sister." Phan denies making that statement. A jury could believe she did say it. If so, the jury could infer that, because Phan does not have a sister named Linda, she was concealing her knowledge of wrongdoing.

Finally, Phan contends, without conceding guilt, that she should at least be resentenced as a minor participant who merely went to the post office to pick up a package for her niece. However, the jury heard the whole story, and the judge who pronounced the sentence had reviewed the evidence on post trial motions, and concluded that the verdict was supported by the evidence. Both Defendants having been found guilty as charged, and the amount of the drugs not challenged, the sentence was consistent with the applicable guidelines.

AFFIRMED.

A&M RECORDS, INC., a corporation; Geffen Records, Inc., a corporation; Interscope Records, a general partnership; Sony Music Entertainment, Inc., a corporation; MCA Records, Inc., a corporation; Atlantic Recording Corporation; Island Records, Inc., a corporation; Motown Record Company, LP, a limited partnership; Capitol Records, Inc., a corporation; La Face Records, a joint venture; BMG Music d/b/a The RCA Records Label, a general partnership; Universal Records, Inc., a corporation; Elektra Entertainment Group, Inc., a corporation; Arista Records, Inc., a corporation; Sire Records Group, Inc., a corporation; Polygram Records, Inc., a corpo-

TUYET MAI THI PHAN #01973-093
UNIT E, FCI CAMP PARKS
5701 8TH STREET
DUBLIN CA. 94568
PRO SE

IN THE SUPREME COURT OF

THE UNITED STATES

TUYET MAI THI PHAN
Petitioner,

vs

UNITED STATES OF AMERICA
Respondent

CASE: NO_____

MOTION TO EXPLAIN PRO SE FILING

MOTION TO EXPLAIN PRO SE FILING

Comes now the petitioner Tuyet Mai Thi Phan, is filing this writ of certiorari pro se, is due to the fact that the attorney who filed in the Ninth Circuit Court of Appeals resign form the case and the Ninth Circuit order the District Court in Guam to provided an attoney to finish up the appeal process. I have not heard from the District court other than to send me a copy of the docket sheet where it was so order to appoint new counsel. But as to this date no new counsel has approach or tried in anyway to concact me. I have taken it upon my self to file this Writ of certiorari myself.

I hope that this court will appoint counsel if it see fit to grant the writ of certiorari.

Respectfully submitted under the mandates of Haines v Kerner, 404 U.S. 519,

6-17-02
DATE

TUYET MAI THI PHAN pro se

ORIGINAL

No. 02 5034

Supreme Court U.S.
FILED
JUN 16 2002
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2001

TUYET MAI THI PHAN — PETITIONER
(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

PROOF OF SERVICE

I, Tuyet Mai Thi Phan, do swear or declare that on this date, June 18, 2002, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names and addresses of those served are as follows:

SOLICITOR GENERAL OF THE UNTIED STATES
ROOM 5614, Department of Justice,
950 Pennsylvania Avenue, N.W.
Washington D.C. 20539-001

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 6-17-02, 20__

(Signature)

FILED
SEP 30 2002
CLERK

s. 01-10873 and 02-5034

IN THE SUPREME COURT OF THE UNITED STATES

KHANH PHUONG NGUYEN, PETITIONER

v.

UNITED STATES OF AMERICA

TUYET MAI THI PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

MICHAEL CHERTOFF
Assistant Attorney General

MONICA S. ABRAMS
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Department of Justice
Washington, D.C. 20530-0001
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10pp

QUESTION PRESENTED

Whether the court of appeals' unanimous affirmance of the petitioners' convictions should be set aside because of the participation of a single, non-Article III judge on the court of appeals' panel.

IN THE SUPREME COURT OF THE UNITED STATES

No. 01-10873

KHANH PHUONG NGUYEN, PETITIONER

v.

UNITED STATES OF AMERICA

No. 02-5034

TUYET MAI THI PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (No. 01-10873 Pet. App. 1-6) is reported at 284 F.3d 1086.[1]

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[1] All citations to the petition appendix refer to the appendix filed in No. 01-10873, which is identical to the petition appendix filed in No. 02-5034.

JURISDICTION

The court of appeals entered its judgment on March 25, 2002. Neither petitioner filed a petition for rehearing. The petition for a writ of certiorari in No. 01-10873 was filed on May 29, 2002, and the petition for a writ of certiorari in No. 02-5034 was filed on June 18, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the District Court for the District of Guam, petitioners were convicted of conspiracy to import methamphetamine, in violation of 21 U.S.C. 952(a), importation of methamphetamine, in violation of 21 U.S.C. 960(B), and attempting to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(A). Both petitioners were sentenced to 212 months' imprisonment. The court of appeals affirmed.

1. In December 1999, a Guam Customs Office conducted a drug-detection canine sniff of 22 mail parcels at Guam's Main Postal Facility. Pet. App. 2; Gov't. C.A. Br. 4. The dog alerted to a package that was addressed to Linda Phan in Guam, and that contained a return address of Michael Tran, 12181 Candy Land, Garden Grove, California. Pet. App. 2-3. After obtaining a search warrant, the Customs Officer opened the package and found, among other things, five cylinders containing 443.8 grams of 97 percent pure d-Methamphetamine Hydrochloride. Id. at 2; Gov't C.A. Br. 6.

The Customs Service prepared the package for a controlled delivery by substituting rock salt for the methamphetamine. Pet. App. 2. The surface of each cylindrical object was sprayed with "clue spray," an invisible fluorescent powder that turns orange when illuminated with ultraviolet light. Id. at 3.

During the controlled delivery, petitioner Phan claimed the package at her local post office. After retrieving the package, Phan took a twenty-five minute, circuitous route home, even though the post office is located only one block from Phan's apartment. Pet. App. 3; Gov't C.A. Br. 9. After Phan entered the apartment, a breaching signal indicated to officers that the package had been opened. The officers entered the apartment and found both petitioners in the living room, surrounded by parts of the opened package. Two of the cylinders were in the toilet and three were in the bathtub. Pet. App. 3. The officers spotted orange clue spray on petitioner Nguyen's hand and dress. After obtaining search warrants, the officers recovered from petitioner Nguyen's apartment drug paraphernalia and a small amount of methamphetamine. Ibid.; Gov't C.A. Br. 12. Officers later learned that California police had interviewed Nguyen's brother, who is also Phan's nephew, on an unrelated matter. Pet. App. 3. When asked for identification, he presented a falsified California driver's license bearing the same address as that appearing on the return label of the Guam package. Ibid.

2. A grand jury indicted petitioners on charges of (1) conspiring to import methamphetamine, in violation of 21 U.S.C. 952(a), (2) knowingly aiding and abetting in the importation of more than fifty grams of methamphetamine, in violation of 18 U.S.C. 960, and (3) attempting to possess with intent to distribute more than fifty grams of methamphetamine, in violation of 21 U.S.C. 841. A jury found both petitioners guilty on all counts. Pet. App. 4. The district court sentenced both petitioners to 212 months' imprisonment. Ibid.

3. The court of appeals unanimously affirmed. Pet. App. 1-6. The court of appeals panel consisted of Chief Judge Schroeder, Judge Goodwin, and, sitting by designation, Chief Judge Munson of the District of the Northern Mariana Islands.

ARGUMENT

Petitioners contend (01-10873 Pet. 4-6; 02-5034 Pet. 4-5) that this Court should grant certiorari "in an exercise of this Court's supervisory powers" because the court of appeals' judgment "was vitiated by the participation of the judge for the District Court for the Northern Mariana Islands," a non-Article III judge. This Court's review is not warranted for four reasons.

First, petitioners raise this issue for the first time in their petitions for certiorari. Petitioners did not object to the composition of the court of appeals' panel before, during, or after

oral argument.[2] Nor did either petitioner seek rehearing or rehearing en banc based on the panel's inclusion of a single non-Article III judge. This Court's "traditional rule * * * precludes a grant of certiorari * * * when the question presented was not pressed or passed upon below." United States v. Williams, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see also Posters 'N' Things v. United States, 511 U.S. 513, 527 (1994).

Second, by failing to object to the composition of the panel before the court of appeals, petitioners waived their right, if any, to a panel composed entirely of Article III judges. Cf. Peretz v. United States, 501 U.S. 923, 936-937 (1991) ("The Constitution affords no protection to a defendant * * * who fails to demand the presence of an Article III judge at the selection of his jury"); Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848-849 (1986) ("as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver").

Third, petitioners identify no conflict in the circuits on the question presented. Nor are we aware of any. The only other Circuit that includes territorial district judges within its

---

[2] Oral argument was heard in petitioner Nguyen's appeal. Petitioner Phan waived oral argument five days before the scheduled argument date. Because the Ninth Circuit reveals the composition of appellate panels one week before oral argument, Phan either knew or could have known the composition of her panel at the time she waived oral argument.

jurisdiction is the Third Circuit, which has not yet, to our knowledge, had territorial judges sit on appellate panels.

Fourth, even if petitioners' claim has not been waived, this Court could review their claim only for plain error because they did not object below. Fed. R. Crim. P. 52(b); United States v. Olano, 507 U.S. 725 (1993). No plain error occurred.

In the first place, it is debatable whether the separation of powers principles embodied in Article III apply to the residents of United States territories. See United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) ("Only 'fundamental' constitutional rights are guaranteed to inhabitants of * * * [the unincorporated] territories."); Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 64-65 (1982) (noting territorial exception to Article III); Glidden Co. v. Zdanok, 370 U.S. 530, 544 (1962) (plurality opinion) ("in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies") (footnote omitted).

In any event, this Court has long held that the "de facto officer doctrine confers validity upon acts performed by a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or

election to office is deficient." Ryder v. United States, 515 U.S. 177, 180 (1995). In Ryder, this Court declined to apply the de facto officer doctrine to a claim that two of the judges serving on the Coast Guard Court of Military Review were appointed in violation of the Appointments Clause of Article II of the Constitution. The Court explained that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question." Id. at 182. But the Court noted that prior cases had applied the de facto officer doctrine where the objection had not been timely raised before the tribunal at issue and the objection did not rest on the Constitution. Id. at 182. Here, in contrast to Ryder, petitioners belatedly challenge the participation of one judge on the appellate panel, without having pressed their arguments before the challenged tribunal. Petitioners, moreover, appear to make no constitutional challenge to the participation of the non-Article III judge, but instead argue that "[n]o statute authorizes the designation or assignment of a non-Article III judge." 01-10873 Pet. 4, 02-5034 Pet. 4-5. Such statutory claims are subject to application of the de facto officer doctrine. McDowell v. United States, 159 U.S. 596, 598 (1895).

Finally, any error could not have affected petitioners' substantial rights. Cf. Ryder, 515 U.S. at 186 (declining to reach

"whether the alleged defects in the composition of petitioner's appellate panel are susceptible to harmless-error review"). Petitioners' appeal was heard and decided by two Article III judges, who both agreed that petitioners' challenges to the district court's evidentiary rulings and the sufficiency of the evidence were meritless. "A majority of the number of judges thus authorized to constitute the court was present, heard oral argument, and participated in the decision, as provided in 28 U.S.C. § 46(c) and (d)." Tobin v. Ramey, 206 F.2d 505, 506 (5th Cir. 1953), cert. denied, 346 U.S. 925 (1954). See also Murray v. National Broadcasting Co., 35 F.3d 45, 46-47 (2d Cir. 1994) (holding that 28 U.S.C. 46(b) "was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate"), cert. denied, 513 U.S. 1082 (1995).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

SEPTEMBER 2002

(6) (5)

No. 01-10873, 02-5034

Supreme Court U.S.
FILED
JAN 3 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KHANH PHUONG NGUYEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TUYET MAI THI PHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED MAY 29, 2002 (01-10873)
PETITION FOR CERTIORARI FILED JUNE 18, 2002 (02-5034)
CERTIORARI GRANTED NOVEMBER 4, 2002

14pp

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NOTICE

The following document has been omitted in the printing of this Joint Appendix. It may be found in the Petitioner's Appendix to the 01-10873 Petition For A Writ Of Certiorari.

Nguyen v. *United States*, 284 F.3d 1086 (9th Cir. 2002)

DISTRICT COURT OF GUAM

CR-99-00158

UNITED STATES OF AMERICA,
Plaintiff,

v.

TUYET MAI THI PHAN, *et al.*,
Defendant.

RELEVANT DOCKET ENTRIES

DATE	NR.	PROCEEDINGS
1999		
12/22	1-1	INDICTMENT—Sumns issd. Hrg set for 12/22/99—4:00 p.m.;
		Applies to: DFT Sealed, DFT Sealed [MBA EOD 12/16/1999]
		* * * *
3/29	56-1	VERDICT—Cnt I—Guilty; Cnt II—Guilty; Cnt III—Guilty;
		Applies to: DFT Phan, Tuyet Mai Thi [RMM EOD 03/30/2000]
	57-1	VERDICT—Cnt I—Guilty; Cnt II—Guilty; Cnt III—Guilty;
		Applies to: DFT Nguyen, Khanh Phuong [RMM EOD 03/30/2000]

DATE	NR.	PROCEEDINGS
	58-1	MINUTE ENTRY—Jury Trial, Day FIVE—Closing arguments made. Jury deliberates and returns verdicts. Dfts found Guilty on all counts. Jury polled. Sent set for 07/11/00 at 1:30 p.m. PSR due 06/07/00. Dfts rem to t/cust of t/USMS; Applies to: DFT Phan, Tuyet Mai Thi, DFT Nguyen, Khanh Phuong [RMM EOD 03/30/2000]
		* * * *
7/11	64-1	MINUTE ENTRY—Sentencing—DFT sent to 212 mos. for Ct 1; 212 mos. for Ct 2 & 212 mos. for Ct 3 (to run concurrently); 60 mos. suprvd rel for Cts 1, 2 & 3; 200 hrs. community svcs; $300 special assessment fee; fine waived. DFT remanded to custody of U.S. Marshals; Applies to: DFT Nguyen, Khanh Phuong [MBA EOD 07/13/2000]
	65-1	MINUTE ENTRY—Sentencing—DFT sent to 212 mos. for Ct 1; 212 mos. for Ct 2 & 212 mos. for Ct 3 (to run concurrently); 60 mos. suprvd rel for Cts 1, 2 & 3; 200 hrs. community svcs; $300 special assessment fee; fine waived. DFT ord remanded to custody of U.S. Marshals; Applies to: DFT Phan, Tuyet Mai Thi (MBA EOD 07/13/2000]
7/24	66-1	NOTICE of Appeal; Applies to: DFT Nguyen, Khanh Phuong [MBA EOD 07/24/2000]

DATE	NR.	PROCEEDINGS
7/26	67-1	JUDGMENT in a Cr Cs; Applies to: DFT Phan, Tuyet Mai Thi [MBA EOD 07/26/2000]
	68-1	JUDGMENT in a Cr Cs; Applies to: DFT Nguyen, Khanh Phuong [MBA EOD 07/26/2000]

US COURT OF APPEALS FOR THE NINTH CIRCUIT

Court of Appeals Docket #: 00-10353

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

KHANH PHUONG NGUYEN,
Defendant-Appellant.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
8/8/00	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 7/26/00; setting schedule as follows: transcript shall be ordered by 8/16/00 for Khanh Phuong Nguyen; transcript shall be filed by 9/15/00; appellants' briefs, excerpts due by 10/25/00 for Khanh Phuong Nguyen; appellees' brief due 11/24/00 for USA; appellants' reply brief due by 12/8/00 for Khanh Phuong Nguyen. (RT required: yes) (Sentence imp 212 mos) [00-10353] (af) [00-10353]
	* * * *
12/7/00	Filed motion and deputy clerk order (Deputy Clerk: JLC) PROMO: The motion of appellant Phan in No 00-10406 to consolidate her appeal with appellant Nguyen's appeal in No. 00-10353 is granted. The opening briefs are now due 1/10/01; appellees' brief due 2/9/01; and the optional reply brief is due 14 days from service

DATE	PROCEEDINGS
	of the answering brief. Any subsequent motion shall contain a recital of defendant's bail status. (Motion recvd 12/1/00) [00-10353, 00-10406] (tm) [00-10353 00-10406]
	* * * *
1/26/01	Received Appellant Tuyet Mai Thi Phan in 00-10406's brief in 5 copies 25 pages (Informal: no); with 5 Exc of records in 1 vol; deficient (insufficient copies) notified counsel. Served on 1/24/01. respnse to brief deficiency notice due 2/14/01. (af) [00-10406]
1/30/01	Filed original and 15 copies Appellant Khanh Phuong Nguyen in 00-10353 opening brief (Informal: n) 19 pages and five excerpts of record in 1 volumes; served on 1/22/01 [00-10353, 00-10406] (tm) [00-10353 00-10406]
	* * * *
3/1/01	Filed original and 15 copies appellee USA's 30 pages brief, 1 Exc. vols: ; served on 2/23/01 [00-10353, 00-10406] (tm) [00-10353 00-10406]
3/1/01	Filed pre-sentencing report UNDER SEAL. [00-10353, 00-10406] (tm) [00-10353 00-10406]
3/9/01	Filed original and 15 copies Khanh Phuong Nguyen in 00-10353 reply brief, (Informal: n) 5 pages; served on 3/6/01 [00-10353] (tm) [00-10353]
3/13/01	Filed original and 15 copies Appellant Tuyet Mai Thi Phan in 00-10406's reply brief (Informal: n) 5 pages; minor defcy: proof of service missing. Notified counsel. [00-10353, 00-10406] (tm) [00-10353 00-10406]

DATE	PROCEEDINGS
	* * * *
11/28/01	CALENDARED: GUAM Tuesday Feb 12 2002 10:00 am [00-10353, 00-10406] (aw) [00-10353 00-10406]
	* * * *
2/12/02	ARGUED AND SUBMITTED TO Mary M. SCHROEDER, Alfred T. GOODWIN, Alex R. Munson [00-10353] (aw) [00-10353]
3/25/02	FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. Mary M. SCHROEDER; Alfred T. GOODWIN, author; Alex R. Munson.) FILED AND ENTERED JUDGMENT. [00-10353, 00-10406] (tm) [00-10353 00-10406]
	* * * *

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALENDAR FOR HAGATNA, GUAM

February 1, 2002

February 12, 2002

Case No.	Title of Cause	Nature	Origin

Tue. 12 10:00 a.m. 4th floor Courtroom
Before: SCHROEDER, GOODWIN, CJJ; MUNSON [No. Mar.] DJ

00-10353) United States v. Nguyen Criminal Guam
00-10406) United States v. Phan

Judge Sitting by Designation:

Hon. Alex R. Munson, Chief District Judge for District of No. Mariana Islands

Location of Hearing:

United States Courthouse
520 West Soledad Avenue, 4th Floor
Hagatna, GU 96910

www.ca9.uscourts.gov

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALENDAR FOR SAIPAN,
NORTHERN MARIANA ISLANDS

February 1, 2002

February 14, 2002

Case No.	Title of Cause	Nature	Origin
Thu. 14	1:30p.m. 1st Floor Courtroom		
	Before: SCHROEDER, GOODWIN, CJJ; UNPINGCO [Guam], DJ		
00-16594	Oden v. Northern Marianas Colleges	Pacific	N.Mar
00-17437	San Nicolas v. Dept. of Public Safety	Federal	N.Mar
01-15119	Ayuyu v. Tagabuel	Rights	N.Mar
01-15405	Dateline Exports, Inc. v. Basic Construction Inc.	Interlocutory	N.Mar

Judge Sitting By Designation:

Hon. John S. Unpingco, Chief District Judge for District of Guam

Location of Hearing:

United States District Court
Horiguchi Building
Beach Road
Saipan, MP 96950

www.ca9.uscourts.gov

UNITED STATES COURTS FOR THE NINTH CIRCUIT
[SEAL] Public Information Office

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NEWS RELEASE

Contact: David Madden, (415) 556-6177
February 7, 2002

COURT OF APPEALS SCHEDULES HEARINGS IN GUAM, SAIPAN

SAN FRANCISCO—The United States Court of Appeals for the Ninth Circuit has scheduled special sittings next week in the U.S. Territory of Guam and the Commonwealth of the Northern Mariana Islands. The court last heard cases in Guam 19 years ago and has never before had a sitting in the Northern Mariana Islands.

Chief Judge Mary M. Schroeder and Senior Circuit Judge Alfred T. Goodwin will sit on an appellate panel that will hear cases in Hagatna, Guam, on Feb. 12, and Saipan, NMI, on Feb. 14. Joining them on the panel will be Chief District Judge John S. Unpingco of the U.S. District Court of Guam and Chief District Judge Alex R. Munson of the U.S. District Court of the Northern Mariana Islands. Judge Munson will hear cases in Guam, while Judge Unpingco will hear cases in the Northern Mariana Islands.

"We are very happy that the Court of Appeals has chosen to visit us," Judge Unpingco said. "Their presence here means a lot to the people of the territory. We are part of the Ninth Circuit and the court's coming here really brings that point home."

Judge Unpingco said he looked forward to hosting the chief judge of the circuit.

"We're very proud of the work we do here and look forward to showing our operation to her," he said.

For Robert Torres, an attorney in Guam who serves as a Lawyer Representative to the Ninth Circuit Judicial Council, the visit confirms that the Ninth Circuit "really is a traveling circuit."

"This is a very exciting event for the legal community here," Torres said.

The district court for the Northern Mariana Islands was established in 1978. Judge Munson, who has served as chief district judge for the past 13 years, said he and the islands' 100 or so practicing attorneys look forward to the court's visit.

"I think the lawyers are very excited about the opportunity to see cases argued in appellate court. I think we're going to have a full house," Judge Munson said.

Judge Munson added that the visit will reduce costs for the litigants, who would otherwise have paid to send their attorneys to Honolulu or the mainland United States. "I think it realizes the intent of the Criminal Justice Reform Act to reduce litigation costs," he observed.

In Guam, the panel will hear oral arguments in a combined case, *United States v. Nguyen* and *United States v. Phan*, in which Khanh Phuong Nguyen and Tuget Mai Thi Phan appeal their jury trial convictions and sentences for conspiracy and importation of methamphetamine.

In NMI, the panel will hear oral arguments in four cases:

- *Oden v. Northern Marianas College*, in which Meredith Oden appeals the district court's summary judgment in favor of the Northern Marianas College, its Board of Regents and

College President Agnes McPhetres in Oden's action brought under Title IX, 20 U.S.C. § 1681 and 42 U.S.C. § 1983. Oden alleged that she was sexually harassed by her music instructor. A jury awarded Oden general and punitive damages against the music instructor.

- *San Nicolas v. Dept. of Public Safety*, in which Dolores M. San Nicolas appeals the district court's summary judgment dismissal of her action under the Equal Pay Act, 29 U.S.C. § 206 and Title VII, 42 U.S.C. § 2000e alleging that the Commonwealth of the Northern Mariana Islands Department of Public Safety committed wage discrimination on the basis of her female sex during her employment as a Police Captain.

- *Ayuyu v. Tagabuel*, in which Hillary Tagabuel, a police officer of the Northern Mariana Islands, appeals the district court's judgment, following a jury trial, in favor of Ramon Ayuyu in Ayuyu's 42 U.S.C. § 1983 action, seeking to recover for violation of his Sixth Amendment constitutional rights to counsel, arising when Tagabuel questioned Ayuyu and obtained a confession without informing Ayuyu of his right to counsel.

- *Dateline Exports, Inc. v. Basic Construction, Inc.*, a case arising under Northern Mariana Islands jurisdiction, in which Dateline Exports, Inc. appeals the district court's denial of its request for a preliminary injunction seeking to stay Basic Construction, Inc. from transferring its assets out of the United States. In an underlying contractual dispute, the parties entered into a court-approved settlement agreement in which Basic executed a $120,000 promissory note in favor of Dateline. Basic closed its business operation in Saipan, and began transferring its inventory assets out of the country. The district court concluded that Dateline failed to demonstrate irreparable harm, because Basic has met its payments under the Note and Dateline waived its objection to a 12/00 missed payment by accepting late payment.

Appellate panels from the Ninth Circuit Court of Appeals hold court one week a month in the cities of Seattle, San Francisco and Pasadena, and in Portland several times a year. Special sittings also are held in various locations around the circuit. The Ninth Circuit court calendar is available online at www.ca9.uscourts.gov.

# # #

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Nos. 01-10873, 02-5034

Supreme Court, U.S.
FILED
JAN 3 2003
OFFICE OF THE CLERK

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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January 3, 2003

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62

QUESTION PRESENTED

Whether the judgment of a United States Court of Appeals is rendered invalid by the participation of a non-Article III judge on that panel.

LIST OF PARTIES

All parties to the proceeding are listed in the caption of the case.

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OPINION BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is reported at 284 F.3d 1086, and is reproduced in the Petition Appendix.

JURISDICTION

The judgment of the court of appeals was entered on March 25, 2002. The petition for a writ of *certiorari* in 01-10873 was filed on May 29, 2002, and the petition for a writ of *certiorari* in 02-5034 was filed on June 18, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Relevant provisions of Article I, Article III, and Article IV of the United States Constitution are reproduced at Appendix ("App.") 1a-2a. Relevant provisions of Title 28 of the United States Code are reproduced at App. 3a-5a.

STATEMENT OF THE CASE

This case implicates fundamental principles in the structure of our federal court system that are embodied in Article III of the Constitution. The Ninth Circuit panel that heard the appeal below included an Article IV territorial judge[1] who is unprotected by the tenure and salary guarantees of Article III. By permitting a non-Article III judge to sit on an Article III

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[1] "Article IV judges" occupy judgeships created pursuant to Congress's power under Article IV of the Constitution to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. Article IV courts are one variety of "non-Article III courts" (also known as "legislative Courts," *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828)). Other examples include "Article I courts" such as the Court of Veterans Appeals and the Tax Court, and administrative agencies.

court, the Ninth Circuit acted outside the bounds of the federal statute that authorizes judges to sit by designation. Were the statute interpreted to permit such an arrangement, it would unconstitutionally undermine Article III's structural protections and circumvent the Appointments Clause, thereby violating the constitutionally-mandated separation of powers.

Petitioners Khanh Phuong Nguyen and Tuyet Mai Thi Phan were tried and convicted in the District Court of Guam of three offenses related to a charged conspiracy to smuggle drugs. 284 F.3d at 1089. The trial was presided over by Judge John S. Unpingco of the District Court of Guam, an Article IV judge. *Id.* at 1086.

Following entry of judgment, petitioners appealed their convictions to the Ninth Circuit which, pursuant to 28 U.S.C. § 1294(4), hears appeals from the District Court of Guam. The appeals, however, were not heard by a legally constituted panel of the Ninth Circuit. Instead, the Ninth Circuit had scheduled a week-long special sitting in Guam and the Northern Mariana Islands that included Article IV territorial judges. JA 7-12. Thus, Ms. Nguyen's and Ms. Phan's appeals were heard in Guam before a panel composed of two Ninth Circuit judges, Chief Judge Schroeder and Senior Judge Goodwin, and a territorial judge sitting by designation, Judge Alex Munson of the District Court for the Northern Mariana Islands. 284 F.3d at 1087.[2]

Two days later, a slightly modified panel heard cases in the Northern Mariana Islands. For these cases, Judge Unpingco sat by designation with Judges Schroeder and Goodwin, reviewing the opinions of Judge Munson. JA 8.[3]

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[2] Petitioner Phan waived argument, but her case was decided by the same panel. 284 F.3d at 1086; JA6.

[3] Those cases included a Title IX sexual harassment claim, *Oden* v. *Northern Marianas College*, 284 F.3d 1058 (9th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3021 (U.S. June 20, 2002) (No. 01-1865); claims arising under 42 U.S.C. § 1983 for violations of the Fourth, Sixth and Fourteenth Amendments, *Ayuyu* v. *Tagabuel*, 284 F.3d 1023 (9th Cir. 2002); a claim under Title VII alleging retaliatory discharge, *San Nicolas* v. *Department of Public Safety*, 31 Fed. Appx. 496 (9th Cir. 2002) (mem.), *available at* 2002 WL 460151; and a commercial dispute, *Dateline Exports, Inc.* v. *Basic Construction, Inc.*, 306 F.3d 912 (9th Cir. 2002) (per curiam).

In March 2002, the panel affirmed the convictions of Nguyen and Phan. 284 F.3d at 1087.

SUMMARY OF ARGUMENT

This case, although it directly affects only a handful of litigants, has profound implications for the constitutional design of the federal court system. The Chief Judge of the Ninth Circuit, an Article III court, designated Article IV judges to sit on that court. This action rendered the actions of the panel *ultra vires*, for three separate reasons. First, the designation was unauthorized by 28 U.S.C. § 292, the statute that governs sittings-by-designation. Second, even if it were permitted by that statute, the designation violates the constitutional command that the Article III judicial power be vested in judges with life tenure and a guaranteed salary. Third, the Chief Judge's decision to designate an Article IV judge to sit on an Article III court violates the Appointments Clause. For each of these reasons, the judgment of the Ninth Circuit should be vacated and remanded.

1. There is no statutory authorization for a judge of the District Court for the Northern Mariana Islands to sit by designation on the Ninth Circuit. Title 28 contains numerous provisions regarding sittings-by-designation, see 28 U.S.C. §§ 292-297, but none of them permits Article IV judges to sit by designation. The only section that is arguably applicable, 28 U.S.C. § 292(a), is defined by reference to a list that *omits* the Northern Mariana Islands as well as Guam. Under the plain meaning of this statute, then, the designation that occurred here was unlawful. This conclusion is confirmed by the numerous instances in which Congress has distinguished

federal district court judges in Article III courts from judges in the Northern Mariana Islands, Guam, and the Virgin Islands. Finally, this conclusion is supported by the canon of constitutional avoidance, for a contrary interpretation of this statute would raise serious constitutional questions concerning the structure of the Federal Judiciary.

2. If this Court does address those significant constitutional questions, only one answer is possible: The designation of Judge Munson to sit on the Ninth Circuit violated the structural constitutional guarantees embodied in Article III.

In order to ensure judicial independence, the Constitution endows judges of Article III courts with lifetime tenure and a salary that Congress cannot diminished. This constitutional mandate operates in straightforward fashion: All Article III judges possess these attributes, and only judges that possess these attributes may exercise Article III judicial power. An adjudicator who lacks these essential qualities may be termed a "judge," but may not exercise the Article III judicial power.

Judge Munson is not endowed with these protections, and is not an Article III judge. The court on which he sits, the District Court for the Northern Mariana Islands, is a territorial court, created by Congress pursuant to its plenary power over the territories. U.S. Const. art. IV, § 3, cl. 2. A judge of this court serves a ten-year term, may be removed by the President for cause, and his salary is not constitutionally protected from diminishment.

In this case, the panel of the Ninth Circuit—a court that is indisputably constituted pursuant to Article III—included Judge Munson, who is not endowed with Article III guarantees. Judge Munson heard argument, participated in the decisionmaking process, and participated in rendering judgment. The Constitution simply does not permit a non-Article III official to stand in the shoes of an Article III judge. Accordingly, the judgment of the panel is void.

This result is confirmed by the cases in which this Court has considered the boundaries of Article III vis-à-vis non-Article III officers. In the course of evaluating non-Article III entities, as well as "adjuncts" to Article III courts, this Court repeatedly has recognized that the "essential attributes of judicial power" must be retained by Article III judges and Article III courts. Where excessive power is granted to non-Article III officials—whether in the form of excessive jurisdiction, excessive authority, or inadequate supervision by Article III judges—such a delegation of power is unconstitutional. Here Judge Munson exercised full Article III powers. He assumed the role of an Article III judge on an Article III court of appeals. This Court's precedents plainly prohibit such a designation.

This analysis is fully consistent with the fact that Congress has plenary power over the territories, for the simple reason that this case does not concern a territorial court. Congress, it is true, has broad authority under Article IV to regulate the territories and the territorial courts. Here, Congress conferred upon the Ninth Circuit the jurisdiction to hear territorial appeals. Once jurisdiction is conferred upon an Article III court, the protections of Article III attach—just as they do whenever an Article III court exercises judicial power. This analysis is analogous to the principles that govern Congress's control over the "inferior" federal courts. Congress need not create lower federal courts, but once it does, the mandates of Article III come into play. Likewise, Congress need not have assigned jurisdiction over appeals from the District Court of Guam to the Ninth Circuit, but once it did, Article III places limitations on the composition of Ninth Circuit panels that may hear these cases. For this reason too, the judgment of the Ninth Circuit should be vacated.

3. The Chief Judge of the Ninth Circuit's designation of Judge Munson to sit on that court also violated the Appointments Clause. That Clause specifies that only the President may appoint "principal officers," which include

judges of the federal appeals courts. Here, however, the Chief Judge of the Ninth Circuit appointed Judge Munson to sit as a member of that court.

It is no answer that Judge Munson was previously nominated by the President and confirmed by the Senate, because his nomination and confirmation were to a different position than the one he occupied here. This Court has recognized that the confirmation of an official to one position does not permit him to assume a second, separate position without presidential reappointment. Rather, an already-appointed officer may only assume new duties without reconfirmation if the new duties are "germane" to his existing office. Here, however, Judge Munson assumed the duties of a wholly different office. Sitting on the Ninth Circuit is not "germane" to serving as a territorial judge in the Pacific Islands. Although both jobs are performed under the generic title "judge," they stem from entirely different constitutional authority, and the duties of the territorial judge have never been thought to encompass the Article III function. Nor could they, for neither Title 28 nor Article III permits Article IV territorial judges to exercise Article III authority.

4. For all of these reasons, the judgment of the Ninth Circuit must be vacated. This Court has long recognized that statutory defects in the composition of an appellate panel render the actions of that court "void." Moreover, this Court has repeatedly held that defects in judicial authority under Article III, Section 1 and the Appointments Clause are quasi-jurisdictional in nature, for they go "to the validity of the very proceeding under review." *Freytag* v. *Comm'r*, 501 U.S. 868, 898, 914 (1991) (Scalia, J., concurring in part and concurring in judgment). Accordingly, the Court need not apply "plain error" analysis; the judgment must simply be vacated.

Even were plain error analysis appropriate, the error that occurred in this case satisfies that test. For all of the reasons set forth above, the decision of the Chief Judge of the Ninth Circuit to permit a non-Article III judge to hear cases as a

member of that court was error, and obviously so. Accordingly, the first two prongs of the plain error test are met. Furthermore, given its serious and structural nature, the error substantially affected petitioners' rights, and calls into question the "fairness, integrity or public reputation" of the proceedings. *United States* v. *Atkinson*, 297 U.S. 157, 160 (1936). This Court has previously treated a claim that a non-Article III officer sat on an Article III court as a structural error, *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 535-36 (1962) (plurality op. of Harlan, J.), just as it has treated errors under the Appointments Clause, *Freytag*, 501 U.S. at 878-79.

Such an approach is confirmed by the cases in which this Court has treated defects in the composition of an appellate panel as "void," and by the inapplicability of the *de facto* officer doctrine—a doctrine that applies to minor defects in court administration, and that specifically does *not* apply to serious errors like the one that occurred here. Finally, treating this error as a structural error is recommended by the practical impossibility of determining whether the presence of an unlawful adjudicator affected the decisionmaking process. Accordingly, the plain error test is satisfied, and this case should be vacated and remanded for rehearing before a properly-constituted three-member panel of the Ninth Circuit.

ARGUMENT

I. CONGRESS HAS NOT AUTHORIZED JUDGES FROM THE DISTRICT COURT FOR THE NORTHERN MARIANA ISLANDS TO SIT BY DESIGNATION ON ARTICLE III COURTS.

A. The Plain Meaning Of 28 U.S.C. § 292(a) Precludes The Designation Of A Judge From The District Court For The Northern Mariana Islands To Sit On The Ninth Circuit.

Congress has carefully circumscribed when, and under what circumstances, a judge may be designated to sit on a

court other than the one to which he was appointed. See 28 U.S.C. §§ 291-297. Nothing in Title 28 permits a judge of the District Court for the Northern Mariana Islands to sit by designation on the Ninth Circuit.

Section 292(a) states plainly that "district judges" may be designated to sit on the court of appeals within their circuit:

> The chief judge of a circuit may designate and assign one or more *district judges* within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.

Id. § 292(a) (emphasis added). However, a judge of the District Court for the Northern Mariana Islands does not fall within the term "district judge" as defined in Title 28.

Title 28 defines the term "district" as "the districts enumerated in Chapter 5 of [Title 28]." *Id.* § 451. Chapter 5, in turn, contains two sets of provisions that identify the "district judges" and the "judicial districts." Section 133(a) lists the "district judges" to be appointed by the President. See *id.* § 133(a) ("The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows: ...."). It enumerates the districts contained within all 50 states and Puerto Rico. *Id.* The Northern Mariana Islands do not appear on this list.

Similarly, the "judicial districts" are set forth in §§ 81-131. Again, as with § 133(a), these sections list one or more districts for each of the 50 states, as well as for Puerto Rico. 28 U.S.C. §§ 81-131. And again, the Northern Mariana Islands are omitted.[4]

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[4] Nor do Guam or the Virgin Islands appear on these lists. Accordingly, the district courts of those territories are similarly situated to the District Court for the Northern Mariana Islands for purposes of § 292. As non-Article III courts, they are likewise similarly situated for purposes of Article III and the Appointments Clause. *See infra* Sections II, III.

In fact, not only is the District Court for the Northern Mariana Islands excluded from the terms "district" and "district court" as defined by § 451, it does not even fall within the broader term "court of the United States," which is defined to include "the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress *the judges of which are entitled to hold office during good behavior*." 28 U.S.C. § 451 (emphasis added); cf. also Fed. R. Crim. P. 1(b)(3) (defining "Federal judge" for purposes of the Federal Rules of Criminal Procedure; separately enumerating "judge of the United States" as defined in § 451, and territorial judges).

As a simple definitional matter, then, § 292(a) does not provide for judges from the Northern Mariana Islands to sit by designation on the Ninth Circuit. Where, as here, Congress defines the terms it uses in a particular statute, that definition is binding. *Stenberg* v. *Carhart*, 530 U.S. 914, 942 (2000) ("[w]hen a statute includes an explicit definition, we must follow that definition"); see 1A Norman J. Singer, *Sutherland on Statutes and Statutory Construction* § 20:8, at 132 (6th ed. 2002); 2A *id.* § 47:07, at 227-28. Because judges from the District Court for the Northern Mariana Islands are not "district" judges for purposes of Title 28, they may not sit by designation on the Ninth Circuit.

On at least one occasion, Congress has confirmed its understanding that such judges are not included within the definitional provisions of § 451. In 1977, two years after adopting the Covenant to Establish the Commonwealth of the Northern Mariana Islands, Congress enacted legislation to create the District Court for the Northern Mariana Islands. Pub. L. No. 95-157, 91 Stat. 1265 (1977) (codified as amended at 48 U.S.C. §§ 1821-1826). Congress expressly specified that judges from the District Court of Guam could sit by designation on the District Court for the Northern

Mariana Islands. 48 U.S.C. § 1821(b)(2). Its reason for doing so is instructive:

> Since the District Court of Guam is not a "district court" as technically defined in 28 U.S.C. 451, it is necessary to specifically include a judge of the District Court of Guam as one of the judges which may be assigned by the chief judge of the ninth circuit to serve temporarily as a judge of the District Court of the Northern Mariana Islands.

S. Rep. No. 95-475, at 2 (1977), *reprinted in* 1977 U.S.C.C.A.N. 3307, 3307. Congress could not have been clearer: Courts of Guam are not "district courts" for purposes of § 451. Accordingly, the judges of those courts cannot fall within the designation provisions of § 292. And, because the District Court of Guam and the District Court for the Northern Mariana Islands are treated the same for purposes of Title 28, see 48 U.S.C. § 1824(b), this is strong additional evidence that the District Court for the Northern Mariana Islands is not encompassed within § 451, and therefore not within § 292.

Given Congress's exhaustive listing in § 451 of the "districts," there have been few occasions for courts to interpret the term. On those few occasions, however, both Article III and territorial courts have adopted precisely the reasoning set forth above, concluding that the term "district" does not encompass territorial courts excluded from § 451. In *Government of the Virgin Islands* v. *Gereau*, the Third Circuit was confronted with the question whether the federal trial court in the Virgin Islands is a "district" for purposes of Title 28. 502 F.2d 914 (3d Cir. 1974). It looked to § 451, found that the Virgin Islands did not appear in the list of districts enumerated in Chapter 5 of Title 28, and concluded that the trial court in the Virgin Islands was not a "district court" for purposes of Title 28. *Id.* at 931. Likewise, in *Callwood* v. *Callwood*, the federal court in the Virgin Islands observed that:

> [t]he two sets of Federal courts have long been distinguished as Constitutional Courts of the United States and Legislative Courts in the territories created by act of Congress, and thus the words "District Court" as used throughout Title 28 have been clearly defined in Section 451 to mean only the former, except where such provisions have been made specifically applicable to the latter.

127 F. Supp. 179, 181 (D.V.I. 1954).

This Court has reasoned likewise, in an analogous context. In *Mookini* v. *United States*, the Court held that the then-territorial District Court of Hawaii was not a "United States District Court" for purposes of the Criminal Appeals Rules. 303 U.S. 201 (1938). The Court's analysis confirmed the approach set forth above. Specifically, it stated that in the absence of a specific provision to the contrary, the phrase "'District Courts of the United States,' .... describes the constitutional courts created under Article III of the Constitution." *Id.* at 205. This is the case because "[c]ourts of the Territories are legislative courts, and are not District Courts of the United States." *Id.*[5]

The plain meaning of § 292, as illuminated by the definitional provisions that govern it, is that only judges who are designated as "district judges" under Title 28 may sit by designation on appellate panels. Judge Munson may be denominated a "judge," but he is not a "district judge" for

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[5] *Accord Talbot* v. *McCarrey*, 218 F.2d 565, 566 (9th Cir. 1954) (Alaska District Court is not a "'court of the United States'"); *Wells* v. *United States*, 214 F.2d 380, 382 (5th Cir. 1954) (District Court for the Canal Zone is not a "district court": "[T]he term 'district courts' means only those courts which are created under Article III of the Constitution and which are constituted by Chapter 5 of Title 28.") Today, the Federal Rules of Criminal Procedure specifically enumerate—and thereby also distinguish—"United States district courts," the "district court of Guam" and the "district court for the Northern Mariana Islands." Fed. R. Crim. P. 1(a).

purposes of Title 28. Cf. *Gereau*, 502 F.2d at 931 (noting that "the mere appellation 'district court'" does not mean that a court is such for purposes of Title 28). The decision by the Chief Judge of the Ninth Circuit to authorize Judge Munson's designation was therefore unlawful on its face.

B. There Are Numerous Other Indications That Congress Intended To Exclude The Northern Mariana Islands From The Definitional Provisions Of 28 U.S.C. § 451.

Even if the definitional provisions of § 451 were less than plain, there are numerous other provisions in the United States Code demonstrating that Congress deliberately excluded judges of the District Court for the Northern Mariana Islands from Title 28's definition of "district judges."

1. At least one jurisdiction other than a State is encompassed within § 451, creating the strong inference that the exclusion of the Northern Mariana Islands from § 451 was deliberate. Congress included Puerto Rico in the definitional provisions of Title 28. Like the Northern Mariana Islands, Guam and the Virgin Islands, Puerto Rico is not a State. Yet Title 28 treats the District of Puerto Rico as a "judicial district," 28 U.S.C. § 119, and the judges of the District of Puerto Rico as "district judges," *id.* § 133(a). The inclusion of Puerto Rico can only mean that the exclusion of the other territories from § 451—including the Northern Mariana Islands—was deliberate. See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*").

Similarly, although the District Court for the Northern Mariana Islands is excluded from the definitional provisions of § 451, it is specifically governed by 28 U.S.C. §§ 452-459 and 462. See 28 U.S.C. § 460(a) (applying §§ 452-459 and 462 to "each court created by Act of Congress in a territory which is invested with any jurisdiction of a district court"). The fact that the District Court for the Northern Mariana

Islands is governed by these provisions immediately adjacent to § 451 is additional evidence that Congress meant to treat it differently from Article III courts for purposes of § 451.

2. Further evidence that Congress does not perceive the District Court for the Northern Mariana Islands to be an Article III federal district court is the fact that Congress did not vest the judges of that court with lifetime tenure—a requirement of Article III, see U.S. Const. art. III, § 1—but instead granted them a term of ten years. It must be presumed that, in creating those courts, Congress was aware that Article III mandates lifetime tenure for Article III judges. *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 696-97 (1979) (Congress is presumed to "know the law"). This presumption applies with even greater force where, as here, unambiguous, foundational constitutional commands are at issue.

Thus, in conformance with the requirements of Article III, Congress has provided that "district judges" hold office "during good behavior." 28 U.S.C. § 134(a). In sharp contrast, judges from the Northern Mariana Islands hold office only for a statutorily-specified term of ten years. 48 U.S.C. 1821(b)(1). Moreover, judges from the Northern Mariana Islands can be removed from office at any time by the President alone for cause. *Id.* The statute requires no congressional ratification or other action. These are unmistakable indications that Congress understands the District Court for the Northern Mariana Islands to be a non-Article III court. See *United States* v. *Lewis*, 456 F.2d 404, 408 (3d Cir. 1972) (holding that District Court of the Virgin Islands is not a "district court" because, among other reasons, its judges serve a statutorily-defined term of years).

Indeed, throughout Title 28 Congress consistently distinguishes between the federal district courts, on the one hand, and the courts in the Northern Mariana Islands, Guam and the Virgin Islands, on the other. Thus, 28 U.S.C. § 631, which governs the selection of magistrate judges, enumerates these courts separately. *Id.* ("The judges of each United

States district court and the district courts of the Virgin Islands, Guam, and the Northern Mariana Islands shall appoint United States magistrate judges....") Moreover, § 631 continues, "[i]n the case of a magistrate judge appointed by the district court of the Virgin Islands, Guam, or the Northern Mariana Islands, this chapter shall apply *as though the court appointing such a magistrate judge were a United States district court*." *Id.* (emphasis added). Similarly, these territorial courts are expressly differentiated from the federal district courts in provisions regarding annuities for judges' surviving family members, compare *id.* § 376(a)(1)(A) with *id.* § 376(a)(1)(B); in provisions governing the salaries of judges upon retirement, compare *id.* § 371 with *id.* § 373; and in numerous other provisions throughout Title 28, see, *e.g.*, *id.* §§ 333, 610, 753, 1291, 1292(a)(1), 1346(b)(1).

Thus, even aside from the plain meaning of § 292, there is abundant evidence throughout the United States Code that Congress did not intend to include the District Court for the Northern Mariana Islands within that provision. The decision to designate a judge from that court to sit on the Ninth Circuit was therefore plainly outside the bounds of the designation statute.

C. The Doctrine Of Constitutional Avoidance Cautions Against Interpreting § 292 To Permit Article IV Territorial Judges To Sit On Article III Courts.

Even if the question presented could not be so easily answered by simple reference to § 292 and § 451, this Court should construe § 292 to forbid the type of designation made here, in order to avoid the constitutional difficulties that would result from a contrary interpretation.

Pursuant to the well-established doctrine of constitutional avoidance, this Court construes ambiguous statutes to avoid difficult constitutional questions: "[W]here a statute is

susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the Court's] duty is to adopt the latter." *United States ex rel. Attorney Gen.* v. *Del. & Hudson Co.*, 213 U.S. 366, 408 (1909). This duty is especially pronounced in the Article III realm, given the "inherent complexity" of Article III questions. See *Peretz* v. *United States*, 501 U.S. 923, 949 (1991) (Marshall, J., dissenting); cf. *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment) ("[p]articularly in an area of constitutional law such as that of 'Art. III Courts,' ... rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy").

Here, a construction of § 292 that would permit Article IV territorial judges to sit by designation on Article III courts would raise precisely the type of grave and doubtful constitutional questions that the doctrine is designed to avoid. (Indeed, as set forth below, permitting such designations plainly would violate the structural guarantees inherent in Article III and further, would violate the mandates of the Appointments Clause. See *infra* Sections II, III.) Accordingly, even were § 292 ambiguous, this Court should construe the statute to forbid Article IV territorial judges from sitting by designation on Article III courts, in order to avoid the difficult constitutional questions that would be posed by a contrary interpretation of the statute.

II. DESIGNATING AN ARTICLE IV TERRITORIAL JUDGE TO SIT ON AN ARTICLE III COURT VIOLATES THE STRUCTURAL GUARANTEES EMBODIED IN ARTICLE III.

Whether or not Congress meant to permit territorial judges to sit on Article III courts, the decision to permit such an arrangement in this case runs afoul of the structural protections contained in Article III. Simply put: When a case

is to be decided by an Article III court, the Constitution requires that it be decided by Article III judges with the full panoply of Article III protections.

This Court has only once confronted whether non-Article III judges may sit on Article III courts, and indicated that such an arrangement is flatly impermissible. In *Glidden*, the Court considered two consolidated cases, in one of which a judge from the United States Court of Claims had sat by designation on the Second Circuit. 370 U.S. at 532 (plurality). The Court clearly stated that Article III courts must be staffed with judges that enjoy "constitutional independence." *Id.* at 538 (plurality) ("the question whether [the judge] enjoyed constitutional independence is inescapably presented"). Furthermore, the Court noted, "the necessity for [an Article III] judge is uncontested." *Id.* at 537 (plurality); *id.* at 597, 604-05 (Douglas, J., dissenting) ("no one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals"; discussing at length the distinction between Article III judges and non-Article III officials).

Congress, likewise, has repeatedly demonstrated its understanding that Article I judges may not sit on Article III courts. On several occasions in the 1950s, Congress declared courts—that previously had been deemed to fall within Article I—to be Article III courts.[6] Among Congress's

[6] See Act of Aug. 25, 1958, Pub. L. No. 85-755, §§ 1, 4, 72 Stat. 848, 848-49; S. Rep. No. 85-2309 (1958), *reprinted in* 1958 U.S.C.C.A.N. 3909, 3909 (declaring the Court of Customs and Patent Appeals to be an Article III court, among other reasons, so that its judges could sit by designation on the federal district and circuit courts); Act of July 14, 1956, ch. 589, §§ 1, 3, 70 Stat. 532, 532; H.R. Rep. No. 84-2348 (1956), *reprinted in* 1956 U.S.C.C.A.N. 3122, 3122-23 (same; Customs Court); Act of July 28, 1953, ch. 253, 67 Stat. 226; H.R. Rep. No. 83-695, at 3, 5-6 (1953) (same; Claims Court). These statutes led to the sittings-by-designation that were at issue in *Glidden*.

purposes for doing so was to enable those judges to sit by designation on Article III courts. The implication, of course, was that so long as they were non-Article III judges, these officials could not sit by designation on Article III courts.

And, as a matter of historical practice, the designation of a non-Article III territorial judge to sit on a Federal Court of Appeals is all but unheard-of, despite a history of judicial innovation dating back to the Judiciary Act of 1789. Over the years, Congress and the courts have employed numerous structures for accomplishing the judicial business of the United States. These include courts delimited by geography and subject area; the creation of judicial "adjuncts," such as magistrates and bankruptcy judges; and the use of court officials, such as special masters and appellate commissioners. See generally Judith Resnik, *"Uncle Sam Modernizes His Justice": Inventing the Federal District Courts of the Twentieth Century for the District of Columbia and the Nation*, 90 Geor. L.J. 607 (2002). Article III judges have long been permitted to sit on other Article III courts,

A similar implication arises out of the reorganization of the federal trade and patent courts in the early 1980s. As new courts were created, provision was made for Article III judges—but not Article I judges—to sit by designation on Article III courts. Thus, when Congress reconstituted the United States Customs Court as the Court of International Trade, *see* Customs Court Act of 1980, Pub. L. No. 96-417, sec. 101, § 251, 94 Stat. 1727, 1727, an Article III court, its judges were expressly permitted to sit by designation on other Article III courts, 28 U.S.C. § 293. Likewise, when Congress abolished the United States Court of Claims and the United States Court of Customs and Patent Appeals, and transferred their judges and much of their jurisdiction to the new Federal Circuit, an Article III court, *see* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, §§ 105, 127, 165, 96 Stat. 25, 28, 37-39, 50 (codified as amended in scattered sections of 28 U.S.C.), its judges, too, were expressly permitted to sit by designation, *see* 28 U.S.C. § 291(a). In notable contrast, the 1982 enactment that created the United States Claims Court (now called the Court of Federal Claims), *see* Pub. L. No. 97-164, § 105, 96 Stat. at 27-28, specifically designated it an Article I court, 28 U.S.C. § 171, and made no provision for its judges to sit by designation on Article III courts.

Lamar v. *United States*, 241 U.S. 103, 118 (1916); *Stuart* v. *Laird*, 5 U.S. (1 Cranch) 299, 308 (1803), and Article I judges have sat by designation on other Article I courts, *e.g.*, Act of Sept. 14, 1922, ch. 306, sec. 5, § 18, 42 Stat. 837, 839 (codified at 28 U.S.C. § 22 (1925)) (authorizing judges from the Court of Customs Appeals to sit by designation on the local courts of the District of Columbia).

Yet, despite this extensive history of innovation in the judiciary, courts other than the Ninth Circuit have exercised steadfast care in hewing to the important distinction between Article III judges and others. The historical record indicates that only in the Ninth Circuit have non-Article III judges (whether Article IV territorial judges, or otherwise) sat by designation on an Article III court.[7] The Third Circuit has not permitted judges from the District Court of the Virgin Islands to sit by designation, nor does the Fifth Circuit appear to have extended that opportunity to judges from the District of the Canal Zone. The uniqueness of the current situation is unsurprising, given the clarity of the constitutional principles at work.

A. Non-Article III Judges May Not Exercise Article III Judicial Power.

To guarantee the independence of the judiciary, and thereby protect its place in the constitutional system of checks and balances, Article III judges are endowed with life tenure and a guaranteed salary. These judges thereby possess institutional independence, and are entrusted with Article III judicial power. Here, however, a judge not protected by these

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[7] Other than the February 2002 sitting that gave rise to the instant case, the Ninth Circuit appears to have permitted Judges Wiig and McLaughlin of the United States District Court for the Territory of Hawaii to sit by designation in a handful of cases in the 1950s. *E.g.*, *Irish* v. *United States*, 225 F.2d 3 (9th Cir. 1955) (Wiig); *Chernekoff* v. *United States*, 219 F.2d 721 (9th Cir. 1955) (McLaughlin).

guarantees exercised Article III power. The Constitution forbids such an arrangement.

It is axiomatic that an independent judiciary plays a critical role in the constitutional system of checks and balances. *N. Pipeline*, 458 U.S. at 60 (plurality op. of Brennan, J.) ("our Constitution unambiguously enunciates a fundamental principle—that the 'judicial Power of the United States' must be reposed in an independent Judiciary"); *Evans* v. *Gore*, 253 U.S. 245, 249-53 (1920), *overruled on other grounds*, *United States* v. *Hatter*, 532 U.S. 557 (2001); see also *The Federalist* No. 78, at 438 (Alexander Hamilton) (Isaac Kramnick ed., 1987) ("The complete independence of the courts of justice is peculiarly essential in a limited Constitution.").

The Constitution's primary mechanism for guaranteeing judicial independence is the endowment of Article III judges with life tenure and an undiminished salary. U.S. Const. art. III, § 1; *The Federalist* No. 79, at 442 (Alexander Hamilton) ("Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support."). These foundational protections predate the founding of our nation, arising out of grievances against King George III. *The Declaration of Independence* para. 11 (U.S. 1776) ("HE has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries."). As the judiciary's primary bulwark against encroachment by the other branches of government, these protections are indispensable to the constitutional design:

> Article III, § 1, establishes a broad policy that federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation. These requirements protect the role of the independent judiciary within the constitutional scheme of tripartite government and assure impartial adjudication in federal courts.

Thomas v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582-83 (1985); *accord United States* v. *Will*, 449 U.S. 200, 217 (1980) ("the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary"); *The Federalist* No. 78, at 437 ("The standard of good behavior for the continuance in office of the judicial magistracy .... is the best expedient which can be devised in any government to secure a steady, upright, and impartial administration of the laws.").

Here, those guarantees were not in place. Because the District Court for the Northern Mariana Islands is a territorial court, see *Guam* v. *Olsen*, 431 U.S. 195, 196 n.1 (1997) (noting that the District Court of Guam was created under Article IV), Congress's power over it is plenary, see U.S. Const. art. IV, § 3, cl. 2,[8] and the Constitution accordingly guarantees Judge Munson neither life tenure nor an undiminished salary. *McAllister* v. *United States*, 141 U.S. 174, 188 (1891) ("the tenure by which the judges of [territorial] courts shall hold their offices, the salary they receive and the manner in which they may be removed or suspended from office, was left, by the Constitution, with Congress under its plenary power over the Territories of the

[8] This Court has reaffirmed Congress's plenary power over the territories numerous times. *E.g.*, *The "City of Panama,"* 101 U.S. (Otto) 453, 459 (1879) ("in legislating for the territories, Congress exercises the unlimited powers of the general and of a State government"); *Canter*, 26 U.S. (1 Pet.) at 546 (referring to Congress's "general powers ... over the territories of the United States"); *see generally McAllister*, 141 U.S. at 180-85 (summarizing early cases). In light of this power, this Court has held, the Constitution has only limited application to the territories. *See Downes* v. *Bidwell*, 182 U.S. 244, 267 (1901) ("the judicial clause of the Constitution has no application to courts created in the territories"); *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850) (territorial governments "are not organized under the Constitution, nor subject to its complex distribution of the powers of government"); *but cf. United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268 (1990) (recognizing that inhabitants of the territories are guaranteed "'fundamental' constitutional rights").

United States"). Judge Munson serves a term of ten years and, perhaps more significant, can be "removed by the President for cause." 48 U.S.C. § 1821(b)(1). Moreover, because the District Court for the Northern Mariana Islands was not created under Article III, Judge Munson's salary—although tied to that of federal district court judges, see *id.*—is guaranteed only by statute, not by the Constitution. See *Glidden*, 370 U.S. at 534 (plurality).

Where these protections are absent, the result is clear: Such judges are not Article III judges, *Northern Pipeline*, 458 U.S. at 60-61 (plurality), and they *may not* exercise the judicial power described in Article III, see *id.* at 59 ("The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."). This fundamental principle was first articulated by Chief Justice Marshall nearly 200 years ago in *American Insurance Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828). In that case, as a predicate to determining whether the territorial courts in Florida could hear cases arising in admiralty, the Court considered whether territorial courts exercise Article III judicial power. It concluded that, because territorial judges in Florida serve four-year terms, they do not exercise such power:

> These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution ....

Id. at 546. This principle has been repeatedly reaffirmed. See *Williams* v. *United States*, 289 U.S. 553, 581 (1933) (a

legislative court "receives no authority and its judges no rights from the judicial article of the Constitution"); *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 244 (1850) ("Congress must not only ordain and establish inferior courts within a State, and prescribe their jurisdiction, but *the judges appointed to administer them must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union*.") (emphasis added).

These cases reflect an understanding that the territories, and the judges of the territorial courts, hold a different place in the constitutional structure than the courts and judges established under Article III. Because "the realities of territorial government typically made it less urgent that judges there enjoy the independence ... envisioned by [Article III]," *Glidden*, 370 U.S. at 546 (plurality), the Court in *Canter* "recognized a greater flexibility in Congress to deal with problems *arising outside the normal context of a federal system*," *id.* at 547 (emphasis added).

But this flexibility has no application where, as here, an Article III court is concerned. Cf. *infra* Section II.C.. The Ninth Circuit is undoubtedly an Article III tribunal and, because its judges are protected by Article III guarantees, they therefore exercise Article III power. By contrast, as this Court has repeatedly and unequivocally held, non-Article III judges may not exercise Article III power. Here, a non-Article III judge did just that. In a case before an Article III tribunal, he heard argument, "participat[ed] in the shared enterprise of appellate decisionmaking," *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 831 (1986) (Blackmun, J., concurring), and cast his vote in favor of the judgment. In short, he purported to exercise the Article III judicial power. This, the Constitution does not allow.

B. This Court Has Repeatedly Recognized Limits On The Power Of Non-Article III Judges.

The principle that non-Article III judges may not exercise the Article III judicial power of the United States is reaffirmed by a series of cases in which courts have set forth constitutional limitations on the functions that may be delegated to non-Article III judges. These cases share a common recognition that non-Article III judges may not take the place of Article III judges. See *Pacemaker Diagnostics Clinic of Am., Inc.* v. *Instromedix, Inc.*, 725 F.2d 537, 544 (9th Cir. 1984) (en banc) (Kennedy, J.) ("If the essential, constitutional role of the judiciary is to be maintained, there must be both the appearance *and the reality* of control by Article III judges over the interpretation, declaration, and application of federal law.") (emphasis added). Non-Article III judges may sometimes carry out functions that would otherwise be undertaken by Article III judges, but only within designated limits. This stands in stark contrast to the case at hand, in which a territorial judge was handed full Article III authority.

Over the past century, this Court has repeatedly considered the extent to which judicial duties may be assigned to either non-Article III courts or "adjuncts" to Article III courts without violating Article III. See generally *CFTC* v. *Schor*, 478 U.S. 833, 847-57 (1986); *Thomas*, 473 U.S. at 582-93; *N. Pipeline*, 458 U.S. at 63-87 (plurality); *id.* at 91 (Rehnquist, J., concurring); *United States* v. *Raddatz*, 447 U.S. 667, 677-83 (1980); *Crowell* v. *Benson*, 285 U.S. 22, 48-65 (1932). This inquiry has evolved into a multi-factor test, including:

> the extent to which the "essential attributes of judicial power" are reserved to Article III courts, and, conversely, the extent to which the non-Article III forum exercises the range of jurisdiction and powers normally vested only in Article III courts, the origins and importance of the right to be adjudicated, and the

concerns that drove Congress to depart from the requirements of Article III.

Schor, 478 U.S. at 851; *Thomas*, 473 U.S. at 587, 589-93; see also *N. Pipeline*, 458 U.S. at 81 (plurality) ("the functions of the adjunct must be limited in such a way that 'the essential attributes' of judicial power are retained in the Art. III court"); *Crowell*, 285 U.S. at 51. In application, this multi-factor test reveals that the more a scheme reserves these "essential attributes" for Article III courts, the greater the likelihood it will be deemed constitutional.

In *Schor*, for example, the Court applied these factors in the course of upholding a grant of jurisdiction over state common-law counterclaims to the Commodity Futures Trading Commission. It noted that the CFTC "deals only with a 'particularized area of law'"; cannot enforce its own orders; is subject to a non-deferential standard of review; and "does not exercise 'all ordinary powers of district courts.'" 478 U.S. at 852-53 (quoting *N. Pipeline*, 458 U.S. at 85). Similarly, in *Raddatz* the Court affirmed the ability of magistrate judges to handle suppression motions, reasoning that the district court's extensive supervision of the magistrate ensured that an Article III judge was making "the ultimate decision." 447 U.S. at 682-83; see also *id.* at 685 (Blackmun, J., concurring) (describing in detail district court supervision of magistrates).

By contrast—and of particular relevance here—the Court in *Northern Pipeline* struck down the broad jurisdictional grant to bankruptcy courts contained in the Bankruptcy Act of 1978. In contrast to the limited grant at issue in *Schor*, the jurisdictional grant was expansive, encompassing all civil proceedings "'*related to*'" Title 11 bankruptcy. 458 U.S. at 85 (plurality). And in contrast to *Crowell*, the courts were not limited to "statutorily channeled factfinding," and they were granted "all ordinary powers of district courts." *Id.* Moreover, review of their decisions was limited, and their

orders were final. *Id.*; see also *Schor*, 478 U.S. at 852-53 (discussing these aspects of *N. Pipeline*)

The Ninth Circuit's designation in this case plainly exceeded the delegation of authority that was struck down in *Northern Pipeline* and is, *a fortiori*, unconstitutional. Here, an Article IV territorial judge assumed the mantle of an Article III judge, with all of the accompanying duties. See 28 U.S.C. § 296 ("A ... judge shall discharge, during the period of his designation and assignment, all judicial duties for which he is designated and assigned."). His jurisdiction was not limited to a "particularized area of law." *N. Pipeline*, 458 U.S. at 85 (plurality). Nor was he supervised by Article III judges; on the contrary, he was granted "all ordinary powers" of the court. *Id.* He was a co-equal participant with two other Article III judges, and combined with them to reach "the ultimate decision" in the case. *Raddatz*, 447 U.S. at 682-83. He acted, for all intents and purposes, as an Article III judge. This designation of power was patently unconstitutional.

C. Congress's Plenary Power Over The Territories Does Not Diminish The Force Of These Article III Principles.

The application of these fundamental principles to this case is wholly consistent with Congress's plenary power over the territories, for this is not a case concerning the authority of territorial courts. Rather, this case was appealed to the Ninth Circuit, an Article III court. Accordingly, the issue here is the extent to which the Constitution governs the composition of that Article III court.

To be sure, Congress has plenary power over the territorial possessions of the United States. U.S. Const. art. IV, § 3, cl. 2; see *supra* note 8. And, given Congress's power over territorial courts, it is quite possible that Congress could constitutionally have provided a different, more limited right

of appeal.[9] And it might even have created an amalgamated court, like the panel that heard cases here. But that is simply beside the point. Congress did not create such a court. And it *did* provide a right of appeal. It specifically provided that appeals from the District Court of Guam will be heard by the Ninth Circuit, 28 U.S.C. § 1294(4), an Article III court. Once jurisdiction was lodged in an Article III court, all of the structural protections that guarantee an independent judiciary—including the participation of judges with life tenure and a guaranteed salary—came into play:

> Congress has broad discretion to circumvent the federal judiciary .... But Congress may not demean or undermine the integrity of the federal courts by using them for enforcement or interpretation of federal law while denying federal judges full independence. The final balance struck is a form of quid pro quo. If Congress desires the stamp of legitimacy that Article III courts provide, it cannot simultaneously undermine that legitimacy by impeding the independence of those courts.

15 *Moore's Federal Practice*, § 100.20[3][c], at 100-41 to -42 (Matthew Bender 3d ed. Mar. 1997) (footnote omitted). Although Congress had discretion whether or not to vest jurisdiction in the Ninth Circuit, once it did so, its decision triggered the protections and requirements of Article III. Cf. *Downes* v. *Bidwell*, 182 U.S. 244, 267 (1901) ("the judicial clause of the Constitution has no application to courts *created in the territories*") (emphasis added).

This conclusion is compelled by the analogous principle that governs Congress's creation of, and control over, the

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[9] This Court has suggested, however, that denying all access to Article III courts might raise constitutional problems. *Olsen*, 431 U.S. at 204; *see also N. Pipeline*, 458 U.S. at 70 n.23 (plurality); *see generally* 1 Laurence H. Tribe, *American Constitutional Law* § 3-5, at 287-89 & nn. 103, 109 (3d ed. 2000).

"inferior" federal courts. U.S. Const. art. III, § 1. Congress was under no obligation to create lower federal courts, see *id.* ("The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress *may* from time to time ordain and establish.") (emphasis added); *Palmore* v. *United States*, 411 U.S. 389, 400-01 (1973), just as it need not have authorized appeals from the District Court of Guam to the Ninth Circuit. But once Congress did create such courts, it could not reduce or diminish the protections guaranteed them by Article III:

> The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. But the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

N. Pipeline, 458 U.S. at 64 n.15 (plurality) (citation omitted). The same principle applies here. Once Congress authorized appeals from the District Court of Guam to an Article III court, then the Article III protections inherent in that court attached. The character of that court is established by the Constitution, and cannot be less than what is afforded by Article III. Because the presence of Judge Munson fundamentally changed the character of the panel of that court that heard this case, his designation to sit on the Ninth Circuit was unconstitutional.

III. UNDER THE APPOINTMENTS CLAUSE OF THE UNITED STATES CONSTITUTION, ONLY THE PRESIDENT MAY APPOINT JUDGES TO THE FEDERAL COURTS OF APPEALS.

The Chief Judge of the Ninth Circuit's decision to designate a non-Article III judge to sit on that court circumvented the Appointments Clause of the United States Constitution. Because judges on the federal courts of appeals

are "principal officers" for purposes of the Appointments Clause, they may only be appointed by the President. The appointment in this case, temporary though it may have been, ignored this constitutional directive. For this reason, too, the judgment of the panel was *ultra vires*, and must be vacated.

As one of the guarantors of the separation of powers, the Appointments Clause "is among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997). Of particular relevance here, the Clause was crafted "to limit the distribution of the power of appointment." *Freytag*, 501 U.S. at 884; see also *id.* at 885 ("The Appointments Clause prevents Congress from distributing power too widely by limiting the actors in whom Congress may vest the power to appoint."). By "carefully husband[ing] the appointment power to limit its diffusion," the Framers thereby "ensure[d] that those who wielded it were accountable to political force and the will of the people." *Id.* at 883-84; see also *Edmond*, 520 U.S. at 660; *Weiss* v. *United States*, 510 U.S. 163, 188 n.3 (1994) (Souter, J., concurring); *The Federalist* No. 76, at 429 (Alexander Hamilton).

To this end, the Clause creates three categories of federal job-holders. The first are "Officers of the United States"—typically referred to as "principal officers," *e.g.*, *Edmond*, 520 U.S. at 660—who must be nominated by the President and confirmed by the Senate. Second, there are "inferior Officers," the appointment of whom may be vested by Congress "'in the President alone, in the Courts of Law, or in the Heads of Departments.'" *Id.* Finally, there are "employees"—"'lesser functionaries'" who "need not be selected in compliance with ... Article II." *Freytag*, 501 U.S. at 880.

Judges of the federal circuit courts are principal officers, and must therefore be appointed by the President and confirmed by the Senate. Although this Court has never specifically addressed this question, it has assumed as much.

See *id.* at 884 (principal officers are "ambassadors, ministers, heads of departments, and judges"). Other authorities are in agreement. *Edmond*, 520 U.S. at 667 (Souter, J., concurring); *Weiss*, 510 U.S. at 191 & n.7 (Souter, J., concurring); *In re Sealed Case*, 838 F.2d 476, 483 (D.C. Cir.), *rev'd on other grounds sub nom. Morrison* v. *Olson*, 487 U.S. 654 (1988); *Thomson* v. *Robb*, 328 S.E.2d 136, 140-41 (Va. 1985); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1593, at 456 n.1 (photo. reprint 1999) (1833).[10]

As principal officers, judges of the federal circuit courts must be appointed by the President. *Pub. Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 488-89 (1989) (Kennedy, J., concurring in the judgment) (referring to the President's "duty assigned under the Constitution to nominate federal judges"); *The Federalist* No. 78, at 436 ("As to the mode of appointing the judges: this is the same with that of appointing the officers of the Union in general ....").

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[10] The criteria set forth in *Edmond* confirm that federal circuit judges are principal officers. *See Edmond*, 520 U.S. at 663 ("'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate"); *id.* at 665 (judges on the Coast Guard Court of Criminal Appeals are inferior officers because they are subject to administrative oversight, can be removed without cause, and "have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers"); *see also Morrison* v. *Olsen*, 487 U.S. 654, 671-72 (1988) (setting forth factors relevant to principal officer status).

Judges of the federal circuit courts, by contrast, face no such supervision. They are independent actors. They have the power to render final decisions. And, although their judgments are subject to review in this Court, *certiorari* jurisdiction is a far cry from having one's "work ... directed and supervised." *Edmond*, 520 U.S. at 663; *see also N. Pipeline*, 458 U.S. at 86 n.39 (plurality) (existence of appellate review is insufficient to satisfy Article III). And, of course, they cannot be removed for cause.

Here, however, a territorial judge was placed on the Ninth Circuit by the Chief Judge of that court. This procedure simply does not satisfy the requirements of the Constitution. Temporary though the appointment may have been, it was impermissible. "[T]he Appointments Clause ... is more than a matter of 'etiquette or protocol.'" *Edmond*, 520 U.S. at 659 (quoting *Buckley* v. *Valeo*, 424 U.S. 1, 125 (1976) (per curiam)). It speaks with "admirable clarity," *Public Citizen*, 491 U.S. at 487 (Kennedy, J., concurring), and propounds a simple rule: Principal officers "*must* ... be appointed in the manner prescribed by [the Appointments Clause]," *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976) (per curiam) (emphasis added).

Allowing a member of the Judiciary to place judges on Article III courts would subvert the very purpose of the Appointments Clause. As noted above, see *supra* at 28-28, that provision was intended to limit the diffusion of the appointment power in order to ensure political accountability. Here, the appointment was made by an official with no political accountability whatsoever. Indeed, it was made by an official who is constitutionally protected from political suasion. This may be acceptable when judges appoint "inferior officers" such as court staff, *e.g.*, *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344, 352-53 (1931) (district court commissioner); *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 260 (1839) (district court clerk), but it is unconstitutional where principal officers are concerned. Plainly, it is "aggrandize[ment]" by the Ninth Circuit, *Weiss*, 510 U.S. at 187-88 (Souter, J., concurring), and it frustrates the constitutional design.

This constitutional error cannot be excused by the fact that Judge Munson was previously nominated by the President and confirmed by the Senate to a *different* position. See 48 U.S.C. § 1821(b)(1). A constitutionally-valid appointment to one office does not entitle the officeholder to avoid the requirements of the Appointments Clause for every future appointment. Were this the rule, the Appointments Clause

would be neutered—nominees could move from office to office, rendering meaningless the Senate's power of advice and consent. This would vitiate the very political accountability that the Clause was intended to create.

This Court has recognized as much. In *Shoemaker* v. *United States*, 147 U.S. 282, 300-01 (1893) and *Weiss*, 510 U.S. at 172-75, the Court evaluated whether grants of additional power to existing officeholders required new appointments. To ensure that the Appointments Clause was not circumvented—while simultaneously recognizing the need to allow some flexibility in the duties that officeholders may assume—the Court developed a test of "germaneness." If an officeholder takes on duties that are "germane" to his existing office, no additional appointment is needed; however, non-germane duties require a new appointment. See *Shoemaker*, 147 U.S. at 301; see also *Weiss*, 510 U.S. at 172-75 (applying *Shoemaker*). The very premise of the germaneness test, then, is that "taking on ... nongermane duties ... would amount to assuming a new 'Offic[e]' within the meaning of Article II, and the appointment to that office would have to comply with the strictures of Article II." *Weiss*, 510 U.S. at 196 (Scalia, J., concurring in part and concurring in the judgment) (alteration in original).

In *Weiss*, for instance, the Court considered whether a military officer, already placed in office in conformance with the Appointments Clause, required an additional appointment to serve as a military judge. *Id.* at 169-70. Noting the "'specialized'" status of the military, *id.* at 174, the Court concluded that the duties of a military judge are germane to the duties of a military officer, as "all military officers ... play a role in the operation of the military justice system," *id.* at 175; see also *Williams* v. *Mercer* (*In re Certain Complaints*), 783 F.2d 1488, 1515 (11th Cir. 1986) (appointment of federal judges by Chief Judge of the Eleventh Circuit to the Investigating Committee of the Judicial Council of the Eleventh Circuit did not violate the Appointments Clause

because such service "is merely an outgrowth of their existing responsibilities").

This case, by contrast, does not present a situation in which Congress "increase[d] the power and duties of an existing office." *Shoemaker*, 147 U.S. at 301. (Indeed, it must be emphasized, *Congress* did not act here at all—the Chief Judge of the Ninth Circuit did.) Rather, the holder of one office was designated to perform the full duties of a second, distinct office that requires constitutionally-unique and vital qualifications, including life tenure and a guarantee against diminishment of salary. Accordingly, *Weiss* and *Shoemaker* demonstrate the unconstitutionality of the designation that occurred here. While some limited number of germane duties may be assigned to an existing officeholder, the assumption of a second office requires a second appointment in conformance with Article II. That did not occur here.

The unconstitutionality of this designation is highlighted by evaluating the germaneness of sitting on the Ninth Circuit to serving as a territorial judge. For even if germaneness analysis were appropriate here, sitting on the Ninth Circuit could never be "an outgrowth of" serving as a territorial judge in the Pacific Islands. The duties of those courts are categorically distinct, as they are constituted pursuant to entirely different constitutional authority. In contrast to Article III judges, who have sat by designation within Article III since the Judiciary Act of 1789, it has *never* been contemplated that judges from Article IV courts would assume the duties of Article III judges.[11] Such an assignment

[11] For this reason, among others, the germaneness analysis has no implications for the well-established practice of sitting by designation *within* Article III. As an historical matter, it has always been understood that Article III judges could constitutionally staff other Article III courts. From the earliest days of the Republic, the "circuit courts" were jointly staffed by Supreme Court justices and district court judges. *See* Judiciary Act of 1789, ch. 20, § 4, 1 Stat. 73, 74-75; *Stuart*, 5 U.S. (1 Cranch) at 308 (approving constitutionality of same). And when the federal intermediate

of duties cannot be germane, given that it violates both Title 28 and the structural guarantees of Article III.

IV. THE APPROPRIATE REMEDY IS VACATUR AND REMAND BEFORE AN APPROPRIATELY-CONSTITUTED PANEL.

A. Errors Concerning The Composition Of An Appellate Panel, As Well As Errors Involving Article III And The Appointments Clause, Require Vacatur.

Because the judgment of the Ninth Circuit was rendered by an improperly-constituted appellate panel, the actions of that panel were *ultra vires*, and must be vacated. For this same reason, "plain error" review under Federal Rule of Criminal Procedure 52(b) is inapplicable. Vacatur is mandated by the many cases in which this Court has recognized that statutory defects in the composition of a court render such a court's decisions "void," and the longstanding treatment of errors under Article III and the Appointments Clause as quasi-jurisdictional.

This principle stretches back at least as far as the turn of the last century, to *American Construction Co.* v. *Jacksonville, Tampa & Key West Railway*, 148 U.S. 372 (1893). In that case, the Court reviewed the judgment of a Fifth Circuit panel that included a judge who had entered one of the trial court orders under review. According to the petitioner, the composition of the panel violated a federal statute, and its ruling was invalid. *Id.* at 387. Although the Court did not interpret the underlying statute—instead granting a rule "to

appellate courts were created by the Evarts Act in 1891, both Supreme Court justices and district court judges were authorized to sit on them. Circuit Court of Appeals Act of 1891, ch. 517, § 3, 26 Stat. 826, 827. Territorial judges, though they have existed for as long as the nation, *see* William Wirt Blume & Elizabeth Gaspar Brown, *Territorial Courts and Law* (pt. 1), 61 Mich. L. Rev. 39, 45-49 (1962), have never performed this function.

show cause why a writ of *certiorari* should not issue" "to bring up and quash [the] decree" of the circuit court of appeals, *id.* at 388—it made absolutely clear that if the composition of the panel were improper, the judgment was without effect:

> If the statute made [the judge] incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error, or *certiorari*.

Id. at 387.

In *Moran* v. *Dillingham*, the Court considered the same type of error. 174 U.S. 153 (1899). Once again, the Court simply vacated the decision of the improperly-constituted court of appeals, reasoning that because "the decree in which [the judge] participated was not made by a court constituted as required by law," the judgment of the circuit court must be "*set aside and quashed, and the case remanded to that court to be there heard and determined according to law by a bench of competent judges.*" *Id.* at 158; *accord William Cramp & Sons Ship & Engine Bldg. Co.* v. *Int'l Curtis Marine Turbine Co.*, 228 U.S. 645, 650-52 (1913); see also *Frad* v. *Kelly*, 302 U.S. 312, 316, 319 (1937) (holding that parties could not stipulate to having a judge hear cases outside the scope of his statutory designation, because such a defect was "jurisdictional," and his order "was null").

Given the treatment of *statutory* errors in the composition of appellate panels, *a fortiori* is it true that analogous *constitutional* errors require vacatur. This Court has long treated errors like this one—in which officials purport to exercise power that is forbidden to them under Article III, Section 1 and under the Appointments Clause—as quasi-jurisdictional in nature. *Glidden* is of particular significance in this regard, for it concerned precisely the same claim of Article III error that is present here. In that case, as here, the

Court considered Article III issues arising out of a claim that a non-Article III judge had sat on an Article III panel. 370 U.S. at 533 (plurality). The Court reached the merits of the question—despite the fact that it was never raised below—noting that where an error "embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as 'jurisdictional.'" *Id.* at 536 (plurality).

Indeed, in numerous cases decided during the past twenty years, this Court has recognized that errors arising out of Article III and the Appointments Clause are quasi-jurisdictional, if not actually jurisdictional. In *CFTC* v. *Schor*, the Court considered an Article III challenge to a grant of authority to the Commodity Futures Trading Commission. It analogized the claimed error to a defect in subject-matter jurisdiction, noting that Article III "serve[s] institutional interests that the parties cannot be expected to protect." 478 U.S. at 851; see also *Freytag*, 501 U.S. at 878 (considering Appointments Clause challenge that was not raised below because of the role of the Appointments Clause in "preserv[ing] an[] aspect of the Constitution's structural integrity").

Likewise, in *Gomez* v. *United States*, the Court considered a challenge to the authority of a magistrate judge to conduct jury selection. 490 U.S. 858 (1989). It held that the magistrate did not have such authority and, in so doing, specifically declined to apply harmless error analysis. Noting that basic trial rights cannot be treated as harmless, it held that one such basic right is the "right to have all critical stages of a criminal trial *conducted by a person with jurisdiction to preside*." *Id.* at 876 (emphasis added).

Here, Judge Munson did not have "jurisdiction to preside" over Ms. Nguyen's and Ms. Phan's appeals. *Id.* His participation was unauthorized by statute, and violated both Article III and the Appointments Clause—in direct contravention of the structural values guaranteed by these

constitutional provisions.[12] Accordingly, the decision of the Ninth Circuit was a nullity. As constituted, the Ninth Circuit panel did not have "statutory or constitutional *power* to adjudicate the case." *Steel Co.* v. *Citizens for Better Env't*, 523 U.S. 83, 89 (1998). Thus, just as this Court has done in a series of cases dating back over 100 years, it should vacate the judgment.

B. Even Under Plain Error Analysis, The Judgment Must Be Vacated.

1. Pursuant to Federal Rule of Criminal Procedure 52(b), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Accordingly, an appellate court may correct an error not raised below whenever there is an "(1) error, (2) that is plain, and (3) that affects substantial rights," so long as the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (quoting *United States* v. *Olano*, 507 U.S. 725, 732 (1993)) (internal brackets and quotation marks omitted). Here, each of these criteria are easily met.

The first two criteria are so obviously satisfied that they require little discussion. Chief Judge Schroeder's designation of Judge Munson was erroneous for all of the reasons set forth above, and plainly so. It violated the plain meaning of 28 U.S.C. § 292, and was forbidden by both Article III and the Appointments Clause. Given the clarity of the governing statute, and the unmistakable application of the underlying constitutional principles, this error was so manifest as to be

[12] And, just as in *Schor* and *Freytag*, these guarantees "serve institutional interests that the parties cannot be expected to protect." *Schor*, 478 U.S. at 851. This general proposition—which applies where the constitutional values protected by Article III and the Appointments Clause are concerned—is all the more true with regard to error in the composition of an appellate panel. For unlike a trial, where attorneys are trained to notice and object to errors, an appeal is not a proceeding in which errors typically occur that require contemporaneous objection.

"plain." See *United States* v. *Olano*, 507 U.S. 725, 734 (1993) (error is "plain" when it is "obvious").

2. The error in this case likewise satisfies the third and fourth prongs of the plain error inquiry, for the seriousness of the structural error that occurred in this case both affected petitioners' substantial rights, and calls into question the "fairness, integrity, or public reputation of [the] judicial proceedings," *Atkinson*, 297 U.S. at 160.

The substantial rights prong of the plain error test, although often focused on prejudice, see *Olano*, 507 U.S. at 734, is satisfied when an error is "structural." Because structural errors infect the very decisionmaking process, see *Johnson*, 520 U.S. at 468, they "'can be corrected regardless of their effect on the outcome,'" *United States* v. *Cotton*, 122 S. Ct. 1781, 1786 (2002) (quoting *Olano*, 507 U.S. at 735). Where, as here, a judge who renders a final decision on appeal is statutorily and constitutionally precluded from doing so, the error is undoubtedly structural.

This Court has expressly recognized that the type of error that occurred in this case is structural. In *Glidden*, the Court treated the composition of the appellate panel as "a structural defect that went to the validity of the very proceeding under review," *Freytag*, 501 U.S. at 898 (Scalia, J., concurring in part and concurring in judgment) (describing *Glidden*), and addressed these issues, despite the fact that they had not been raised before the court of appeals. Likewise, in *Freytag*, the Court concluded that a claimed "defect in the appointment of [a] Judge" was structural, for it went "to the validity of the ... proceeding that is the basis for this litigation." *Id.* at 878-79. Those precedents squarely govern this case.[13]

[13] *Cf. Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995) ("[T]he doctrine of separation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. In its major features ... it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague

3. The structural nature of the error is confirmed by the cases in which this Court has determined that statutory defects in the composition of a court render such a court's decisions "void." *Am. Constr. Co.*, 148 U.S. at 387; see *supra* at 33-34. In the course of vacating the judgments in those cases, the Court expressly declined to conduct an inquiry into prejudice. The Court's absolutely explicit holding on this score in *Moran* deserves repetition in full:

> [T]he decree in which [the judge] participated was not made by a court constituted as required by law; and therefore this court, *without considering whether that decree was or was not erroneous in other respects*, orders the
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> *Decree of the Circuit Court of Appeals to be set aside and quashed, and the case remanded to that court to be there heard and determined according to law by a bench of competent judges.*

Moran, 174 U.S. at 158 (first emphasis added); see also *Glidden*, 370 U.S. at 533 (plurality) ("Article III, § 1 ... gives the petitioners a basis for complaint without requiring them to point to particular instances of mistreatment in the record."); *United States* v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685, 691 (1960) (vacating decision of en banc panel of Second Circuit because retired judge impermissibly participated; expressly declining to consider the underlying merits of the case)[14]; *William Cramp & Sons*, 228 U.S. at 650 (declining to "consider[] ... the questions urged concerning the merits of the cause"); *Landry* v. *FDIC*, 204 F.3d 1125, 1131-32 (D.C. Cir.) (Appointments Clause violation requires no showing of

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distinctions will not be judicially defensible in the heat of interbranch conflict.").

[14] *American-Foreign Steamship* is of particular note because Respondent American-Foreign Steamship Corporation argued that the petitioner had suffered no harm by the judge's actions. Br. for Resp't at 37-47, *United States* v. *Am.-Foreign S.S. Corp.*, 363 U.S. 685 (1960).

prejudice; "in a challenge to the authority of a non-Article III court on the grounds that the challenger is entitled to a court enjoying Article III's exceptional tenure provisions, the assumption that inadequate tenure may prejudice the challenger is so automatic that it usually goes unmentioned"), *cert. denied*, 531 U.S. 924 (2000); see also *Lavoie*, 475 U.S. at 828 (vacating judgment because conflicted judge cast the deciding vote; not reaching the underlying merits).

In the course of "quash[ing]" these illegitimate judgments, *Moran*, 174 U.S. at 158; *Am. Constr. Co.*, 148 U.S. at 387, the Court has recognized that such errors are so fundamental as to call into question the very integrity of the underlying judicial proceedings. In *American Construction Co.*, the Court labeled the judgment of the circuit court "unlawful." *Id.* In *William Cramp & Sons*, the Court stated that the circuit court "was virtually no court at all, because not organized in conformity to law." 228 U.S. at 652. The Court further recognized that the error in the composition of the circuit court called into question the public reputation of the judicial proceeding:

> [Because] the case was tried and disposed of below, by a court organized, not in conformity to law, but in violation of the express prohibitions of the statute, *we think it plainly results that an error of so grave a character, and involving considerations of public importance, was committed*, as to cause it to be our duty to allow the writ of certiorari, without at all considering, for the purpose of such allowance, the questions urged concerning the merits of the cause.

Id. at 650 (emphasis added).

The necessity of quashing such judgments is all the more acute in the constitutional context that presents itself here. The structural safeguards of Article III speak directly to the integrity and public reputation of the federal courts. Liberty itself depends upon an independent judiciary, *The Federalist*

No. 78, at 437-39 (Alexander Hamilton), and the structural safeguards of Article III are the primary safeguards of that independence, *id.* at 441-42; *id.* No. 79, at 442-43 (Alexander Hamilton). Permitting a non-Article III judge to sit on an Article III court erodes these foundational protections, and such an error requires that the judgment be vacated.

4. The seriousness of the error that occurred in this case is further confirmed by the inapplicability of the *de facto* officer doctrine. The very purpose of that doctrine is—under certain circumstances—to legitimate the actions of officials with deficient title. Yet that doctrine does not apply to errors like this one. The fact that the error in this case is too grave to be excused by an error-correction doctrine that relates to this precise category of error, highlights its severity.

The *de facto* officer doctrine arose out of the fear that chaos would ensue if actions taken by government officials could later be invalidated by exposing technical defects in their title to office. See *Ryder* v. *United States*, 515 U.S. 177, 180-81 (1995). Accordingly, this doctrine confers validity upon acts performed by a person acting under color of official title, even if it is later discovered that his title is deficient.

However—even leaving aside the fact that the doctrine is drifting into desuetude, see *id.* at 183-84 & n.3 (limiting earlier cases to their facts); *Silver* v. *United States Postal Serv.*, 951 F.2d 1033, 1036 n.2 (9th Cir. 1991)—it applies only to challenges arising out of minor defects in an official's title. See *Glidden*, 370 U.S. at 535-36 (plurality) (the doctrine does not apply "when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business"); see also *id.* at 535 (the doctrine prevents litigants from "abiding the outcome of a lawsuit and then overturning it if adverse *upon a technicality* of which they were previously aware") (emphasis added); *EEOC* v. *Sears, Roebuck & Co.*, 650 F.2d 14, 17 (2d Cir. 1981) (referring to "the technical nature of the defect").

So, for instance, in *Ball* v. *United States*, 140 U.S. 118, 128-29 (1891), the Court held that a lawfully appointed judge had *de facto* authority to sit in place of a *deceased* judge, despite the fact that he had only been designated to substitute for a *disabled* judge. In *Wright* v. *United States*, 158 U.S. 232, 238 (1895), the Court held that a duly-appointed deputy marshal was a *de facto* officer, even if his oath of office had not been properly administered. And in *Leary* v. *United States*, the Ninth Circuit concluded that a judge had *de facto* authority, despite the fact that he began a sitting by designation one day before the start of his official assignment. 268 F.2d 623, 627 (9th Cir. 1959). Here, by contrast, "the petitioner is not asking this Court to overturn his conviction 'upon a technicality,' which is the problem that the de facto doctrine is designed to alleviate." *United States* v. *Allocco*, 305 F.2d 704, 707 (2d Cir. 1962).

Given that the doctrine applies only to minor title defects, it simply cannot bar *constitutional* challenges to a judge's authority. See *Glidden*, 370 U.S. at 536 (plurality). It does not govern Appointments Clause challenges, *McDowell* v. *United States*, 159 U.S. 596, 598 (1895); see also *Freytag* v. *Comm'r*, 501 U.S. 868 (1991) (failing to apply the doctrine), and it does not defeat claims arising out of structural constitutional issues. *Glidden*, 370 U.S. at 536 (plurality); cf. *Schor*, 478 U.S. at 849, 850-51 (structural Article III protections cannot be waived).

Moreover, it has long been presumed that the doctrine can foreclose challenges to *statutory* title defects only if—as is not true here—the official already possessed appropriate judicial authority. See *McDowell*, 159 U.S. at 601 (noting that the judge at issue was already "a judge of the United States District Court, having all the powers attached to such office"); *Leary*, 268 F.2d at 627-28 (technical defects do not "bar ... the good faith exercise of judicial office by one *lawfully vested with the powers of a judge*") (emphasis added); see also *Ryder*, 515 U.S. at 182 (noting that *Ball* and

McDowell involved the "misapplication of a statute providing for the assignment of *already appointed judges* to serve in other districts") (emphasis added). Thus, although the doctrine may protect the actions of one who is "duly qualified as a judge," it cannot protect "the empty words of a mere intruder." *Johnson* v. *Manhattan Ry.*, 61 F.2d 934, 938 (2d Cir. 1932) (L. Hand, J.), *aff'd in part*, 289 U.S. 479 (1933). Invited though he may have been, Judge Munson was nonetheless just such an intruder here.

5. The necessity of treating such errors as structural is further supported by pragmatic considerations that go to the unique nature of appellate decisionmaking. Because the appellate process is collective and deliberative, and because it occurs behind closed doors, a prejudice inquiry is impracticable, for it is impossible to determine the role played by the unlawful adjudicator.

No one can doubt that judges "exchange[] ideas and arguments in deciding the case." *Lavoie*, 475 U.S. at 831 (Brennan, J., concurring); see also *Crump* v. *Bd. of Educ.*, 392 S.E.2d 579, 587-88 (N.C. 1990) ("A critical component of any quasi-judicial hearing and decision-making by a deliberative body is the give and take which occurs when group members share their observations and opinions."). Those discussions affect the ultimate shape of the court's decision, in ways both great and small. See *Lavoie*, 475 U.S. at 833 (Blackmun, J., concurring) ("the collegial decisionmaking process that is the hallmark of multimember courts [may lead] the author to alter the tone and actual holding of the opinion to reach a majority, or to attain unanimity").

Because these deliberations occur in secret, however, it is impossible to determine the effect of any one participant on the deliberations of a multi-member panel: "[W]hile the influence of any single participant ... can never be measured with precision, experience teaches us that each member's involvement plays a part in shaping the court's ultimate

disposition." *Id.* at 831 (Brennan, J., concurring). Thus, the "mere participation [of a disqualified judge] in the shared enterprise of appellate decisionmaking ... pose[s] an unacceptable danger of subtly distorting the decisionmaking process." *Id.* (Blackmun, J., concurring in the judgment); *accord Crump*, 392 S.E.2d at 588 (N.C. 1990) ("One biased member can skew the entire process by what he or she does, or does not do, during the hearing and deliberations.").[15]

Accordingly, where, as here, a non-Article III judge sits on a federal court of appeals, this unlawful arrangement constitutes "a structural defect that [goes] to the validity of the very proceeding under review." *Freytag*, 501 U.S. at 884, 898 (Scalia, J., concurring in part and concurring in

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[15] As this Court likewise recognized in *Ayrshire Collieries Corp.* v. *United States*, 331 U.S. 132 (1947), it must be assumed that multi-member decisionmaking is affected by the presence or absence of panel members. In *Ayrshire*, a statute required that a tariff case be heard by a three-judge panel, but when one member of the panel fell ill, the remaining two judges issued the decision. The Court declined to uphold the judgment:

> [W]e cannot say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance. The decision reached by two judges is not necessarily the one which might have been reached had they had the benefit of the views and conclusions of the third judge.

Id. at 139.

For these same reasons, numerous courts—including at least six federal courts of appeals—have recognized the sheer impossibility of determining the effect of one unlawful adjudicator upon the lawfully-appointed members of that panel. *E.g.*, *Berkshire Employees Ass'n of Berkshire Knitting Mills* v. *NLRB*, 121 F.2d 235, 239 (3d Cir. 1941) ("Litigants are entitled to an impartial tribunal whether it consists of one man or twenty and there is no way which we know of whereby the influence of one upon the others can be quantitatively measured."); *see also Stivers* v. *Pierce*, 71 F.3d 732, 746-48 (9th Cir. 1995); *Hicks* v. *City of Watonga, Okla.*, 942 F.2d 737, 748-49 (10th Cir. 1991); *Antoniu* v. *SEC*, 877 F.2d 721, 726 (8th Cir. 1989); *Cinderella Career & Finishing Sch., Inc.* v. *FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Am. Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767-68 (6th Cir. 1966).

judgment). Such an error "undermines the structural integrity of the ... tribunal," *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986), by permitting a judge who is beholden to the Executive Branch for reappointment to sit on a court supposedly insulated by the protections of Article III. Cf. *The Federalist* No. 78, at 441 (Alexander Hamilton) ("inflexible and uniform adherence to the rights of the Constitution ... can certainly not be expected from judges who hold their offices by a temporary commission").

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be vacated and remanded for rehearing before a properly-constituted three-member panel of that court.

Respectfully submitted,

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APPENDICES

APPENDIX A

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8, cl. 9

The Congress shall have Power . . .

To constitute Tribunals inferior to the supreme Court; . . . .

U.S. Const. art. II, § 2, cl. 2

He shall have Power, by and with the Advice and Consent of the Senate to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. III, § 1

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. IV, § 3, cl. 2

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

APPENDIX B

STATUTORY PROVISIONS

28 U.S. C. § 292. District judges

(a) The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires. Such designations or assignments shall be in conformity with the rules or orders of the court of appeals of the circuit. . . .

(June 25, 1948, c. 646, 62 Stat. 901; July 28, 1953, c. 253, § 3, 67 Stat. 226; Sept. 3, 1954, c. 1263, § 39(c), 68 Stat. 1240; July 9, 1956, c. 517, § 1(b), 70 Stat. 497; July 14, 1956, c. 589, § 2, 70 Stat. 532; Aug. 25, 1958, Pub. L. No. 85-755, § 3, 72 Stat. 848; July 29, 1970, Pub. L. No. 91-358, Title I, § 172(e), 84 Stat. 591; Nov. 6, 1978, Pub. L. No. 95-598, Title II, §§ 203, 204, 92 Stat. 2660; Oct. 10, 1980, Pub. L. No. 96-417, Title V, § 501(7), 94 Stat. 1742; Apr. 2, 1982, Pub. L. No. 97-164, Title I, § 109, 96 Stat. 28.)

28 U.S.C. § 451. Definitions

As used in this title:

The term "court of the United States" includes the Supreme Court of the United States, courts of appeals, district courts constituted by chapter 5 of this title, including the Court of International Trade and any court created by Act of Congress the judges of which are entitled to hold office during good behavior.

The terms "district court" and "district court of the United States" mean the courts constituted by chapter 5 of this title.

The term "judge of the United States" includes judges of the courts of appeals, district courts, Court of International Trade

and any court created by Act of Congress, the judges of which are entitled to hold office during good behavior.

The term "justice of the United States" includes the Chief Justice of the United States and the associate justices of the Supreme Court.

The term "district" and "judicial district" mean the districts enumerated in Chapter 5 of this title.

The term "department" means one of the executive departments enumerated in section 1 of Title 5, unless the context shows that such term was intended to describe the executive, legislative, or judicial branches of the government.

The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

(June 25, 1948, c. 646, 62 Stat. 907; Mar. 18, 1959, Pub. L. No. 86-3, § 10, 73 Stat. 9; Sept. 12, 1966, Pub. L. No. 89-571, § 3, 80 Stat. 764; Nov. 6, 1978, Pub. L. No. 95-598, Title II, § 213, 92 Stat. 2661; Oct. 10, 1980, Pub. L. No. 96-417, Title V, § 501(10), 94 Stat. 1742; Apr. 2, 1982, Pub. L. No. 97-164, Title I, § 114, 96 Stat. 29.)

28 U.S.C. § 1294. Circuits in which decisions reviewable

Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: . . .

(4) From the District Court of Guam, to the Court of Appeals for the Ninth Circuit.

(June 25, 1948, c. 646, 62 Stat. 930; Oct. 31, 1951, c. 655, § 50(a), 65 Stat. 727; July 7, 1958, Pub. L. No. 85-508,

§ 12(g), 72 Stat. 348; Mar. 18, 1959, Pub. L. No. 86-3, § 14(c), 73 Stat. 10; Aug. 30, 1961, Pub. L. No. 87-189, § 5, 75 Stat. 417; Nov. 6, 1978, Pub. L. No. 95-598, Title II, § 237, 92 Stat. 2667; Apr. 2, 1982, Pub. L. No. 97-164, Title I, § 126, 96 Stat. 37.)

FEB 21 2003

Nos. 01-10873 and 02-5034

In the Supreme Court of the United States

KHANH PHUONG NGUYEN, PETITIONER

v.

UNITED STATES OF AMERICA

TUYET MAI THI PHAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the judgment of the court of appeals was vitiated by the participation of a non-Article III judge.

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In the Supreme Court of the United States

No. 01-10873

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v.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (01-10873 Pet. App. 1-6) is reported at 284 F.3d 1086.[1]

[1] All citations to the petition appendix refer to the appendix filed in No. 01-10873, which is identical to the petition appendix filed in No. 02-5034.

JURISDICTION

The court of appeals entered its judgment on March 25, 2002. Neither petitioner filed a petition for rehearing. The petition for a writ of certiorari in No. 01-10873 was filed on May 29, 2002, and the petition for a writ of certiorari in No. 02-5034 was filed on June 18, 2002. This Court granted review in both cases on November 4, 2002. This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions reproduced in the appendix to petitioners' brief, at App. 1a-5a, this case requires consideration of Federal Rule of Criminal Procedure 52(b), which provides:

> **Plain Error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

STATEMENT

Following a jury trial in the District Court for the District of Guam, petitioners were convicted of conspiracy to import methamphetamine, in violation of 21 U.S.C. 952(a) and 963, importation of methamphetamine, in violation of 21 U.S.C. 952(a) and 960, and attempting to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. 841(a). Pet. App. 1. Both petitioners were sentenced to 212 months' imprisonment. The court of appeals affirmed. *Id.* at 1-6.

1. a. Guam is an unincorporated territory of the United States that was ceded to the United States in 1899 following the Spanish-American War. 48 U.S.C. 1421, 1421a; see also *Examining Bd. of Eng'rs, Architects & Surveyors* v. *Flores de Otero*, 426 U.S. 572, 599-600 n.30 (1976) (explaining the doctrine of incorporated and unincorporated territories). Petitioner Nguyen is a citizen of Vietnam and was, at the time of her arrest, a lawful permanent resident in the Territory of Guam.[2] Petitioner Phan is a United States citizen and a resident of Guam. Neither petitioner is a resident of a State within the United States.

b. In December 1999, a Guam Customs Officer conducted a drug-detection canine sniff of mail parcels at Guam's Main Postal Facility. Pet. App. 2; Gov't C.A. Br. 4. The dog alerted to an express mail package that was addressed to Linda Phan in Guam, and that contained a return address of Michael Tran, 12181 Candy Lane, Garden Grove, California. Pet. App. 2-3. After obtaining a search warrant, the Customs Officer opened the package and found, among other things, five cylinders containing 443.8 grams of 97 percent pure d-Methamphetamine Hydrochloride. *Id.* at 2; Gov't C.A. Br. 5-6. The Customs Service prepared the package for a controlled delivery by substituting rock salt for the methamphetamine. Pet. App. 2. The surface of each cylindrical object was sprayed with "clue spray," an invisible fluorescent powder that turns orange when illuminated with ultraviolet light. *Id.* at 3.

During the controlled delivery, petitioner Phan claimed the package at her local post office. Although the post office is only one block from her apartment, Phan took a twenty-five minute, "'circuitous' route" home, driving all the way to Guam Memorial Hospital just to dispose of the express mail packaging. Pet. App.

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[2] As an alien convicted of aggravated felonies and violations of the controlled substances laws, Nguyen is now subject to removal. 8 U.S.C. 1227(a)(2)(A)(iii) and (B), 1252(a)(2)(C).

3; Gov't C.A. Br. 8-9. After Phan entered the apartment, a breaching signal indicated to officers that the package had been opened. The officers entered the apartment and found both petitioners in the living room, surrounded by parts of the opened package. Two of the cylinders were in the toilet and three were in the bathtub. Pet. App. 3. The officers spotted orange clue spray on petitioner Nguyen's hand and dress. After obtaining search warrants, the officers recovered from petitioner Nguyen's apartment drug paraphernalia and a small amount of methamphetamine. *Ibid.*; Gov't C.A. Br. 12. Officers later learned that California police had interviewed Nguyen's brother, who is also Phan's nephew, on an unrelated matter. Pet. App. 3. When asked for identification, he presented a falsified California driver's license bearing the same address as that appearing on the return label of the Guam package. *Ibid.*

2. A grand jury indicted petitioners on charges of conspiring to import methamphetamine, in violation of 21 U.S.C. 952(a) and 963 knowingly aiding and abetting in the importation of more than fifty grams of methamphetamine, in violation of 21 U.S.C. 952(a) and 960; and attempting to possess with intent to distribute more than fifty grams of methamphetamine, in violation of 21 U.S.C. 841(a). Pet. App. 4. The case was tried in the District Court of Guam, a territorial court created by Congress under Article IV, Section 3, Clause 2 of the Constitution, which empowers Congress to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." See also 48 U.S.C. 1424. The judge that presided over the trial was an Article IV district court judge. 48 U.S.C. 1424b(a). A jury found both petitioners guilty on all

counts. Pet. App. 4. The district court sentenced both petitioners to 212 months' imprisonment. *Ibid.*

3. The court of appeals unanimously affirmed. Pet. App. 1-6. The court of appeals panel, sitting in the United States Territory of Guam, consisted of Chief Judge Schroeder, Judge Goodwin, and, sitting by designation, Chief District Judge Munson of the District of the Northern Mariana Islands. Like the Guam district court, the District of the Northern Mariana Islands is a court created by Congress under Article IV, Section 3 of the Constitution. See 48 U.S.C. 1821(a). Chief Judge Munson is an Article IV judge, appointed by the President and confirmed by the Senate to serve a term of ten years. 48 U.S.C. 1821(b). No objection was made to the composition of the panel before, during, or after oral argument and submission of the cases, and no petitions for rehearing or rehearing en banc were filed.

SUMMARY OF ARGUMENT

Petitioners suggest that this case has "profound implications" for our constitutional system of governance, Pet. Br. 3, and presents grave and sensitive questions about the intersecting powers of the Judicial, Legislative, and Executive Branches of government under Articles II, III, and IV of the Constitution. But, in fact, this case involves nothing more than an isolated, one-time mistake in statutory construction by a single member of the judiciary. Petitioners offer no basis for concluding that, in designating Chief Judge Munson to hear petitioners' cases, the Chief Judge of the Ninth Circuit deliberately courted difficult constitutional questions or intended to prompt an inter-Branch confrontation. Established principles of constitutional avoidance compel the opposite presumption: "It ought

never to be assumed" that a government official in any of the three Branches "intended to usurp or assume power prohibited to it," *Grenada County Supervisors* v. *Brogden*, 112 U.S. 261, 269 (1884), and constitutional questions should "not be needlessly confronted," *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). See generally *Ashwander* v. *Tennessee Valley Auth.*, 297 U.S. 288, 345-348 (1936) (Brandeis, J., concurring). Accordingly, in the absence of a continuing and concerted policy of designating non-Article III judges to sit on court of appeals' panels, or other evidence of a deliberate constitutional confrontation between the Branches, there is no occasion for this Court to expound upon the delicate and difficult constitutional questions petitioners raise. Sometimes a mistake is just a mistake.

That mistake, moreover, could have been easily remedied had petitioners raised their concerns about the presence of a non- Article III judge before the court of appeals. But they chose not to, preferring to hold that objection in reserve until they came before this Court. Petitioners now seek to invoke this Court's supervisory authority. 01-10873 Pet. 6; 02-5035 Pet. 5. But that supervisory authority is designed to promote "the interests of the administration of criminal justice"; it "ought not to give implied sanction" to appellate gamesmanship or laxity in the preservation of errors, or "to permit the waste and unfairness involved in a new [appeal] if there is no foundation for it." *Ballard* v. *United States*, 329 U.S. 187, 202-203 (1946) (opinion of Frankfurter, J.).

If this Court reaches petitioners' constitutional objections to the panel, it should reject them for the simple reason that petitioners do not enjoy the constitutional

protections they assert. From its earliest days, this Court has consistently held that the protections of Article III do not apply to residents of the territories. Nothing in the Constitution required that petitioners' appeals be heard before an Article III-compliant tribunal. They do not belong to the class of persons for whom that constitutional protection was designed. Congress's passage of a statute directing appeals to the Ninth Circuit did not alter their constitutional rights; it created at most a statutory right, which petitioners abandoned below.

Nor does this case implicate structural protections under Article III that transcend the personal rights of petitioners. In the first place, neither the structural nor the personal protections embodied in Article III apply to the territories. In the second place, this case does not involve inter-Branch aggrandizement or encroachment. It involves an error committed by an official internal to the Judicial Branch. Any intrusion on the Judicial Branch's integrity and independence thus was self-inflicted and wholly capable of internal correction. This Court should not use the isolated internal misstep of a Judicial Branch official as a basis for pronouncing limitations on legislative power that Congress has never exercised, especially when such pronouncements would be for the sole purpose of providing a windfall benefit to defendants whose guilt was proved by overwhelming evidence and who slept on their rights in the court below.

ARGUMENT

I. PETITIONERS' UNTIMELY STATUTORY OBJECTIONS TO THE COMPOSITION OF THE APPELLATE PANEL DO NOT IMPAIR THE VALIDITY OF THE JUDGMENT AFFIRMING THEIR CONVICTIONS

A. The Relevant Statutory Provisions Do Not Authorize The Designation Of Territorial Judges To Sit As Members Of The Federal Judicial Circuits

The Chief Judge of the Ninth Circuit designated Chief Judge Munson of the District of the Northern Mariana Islands to sit on a Ninth Circuit panel pursuant to 28 U.S.C. 292(a). That Section provides, in relevant part:

> The chief judge of a circuit may designate and assign one or more district judges within the circuit to sit upon the court of appeals or a division thereof whenever the business of that court so requires.

The Chief Judge believed the designation to be appropriate because Chief Judge Munson is a district judge whose court is within the Ninth Circuit. 48 U.S.C. 1821, 1823; 28 U.S.C. 1294(4); see generally *Territory of Guam* v. *Olsen*, 431 U.S. 195, 196 & n.1 (1977). In addition, Congress directed that, "[w]here appropriate," the provisions of Title 28 shall apply to the District Court for the Northern Mariana Islands. 48 U.S.C. 1821(c).

As petitioners explain at some length (Br. 7-15), however, Congress's reference to district judges in Section 292(a) was intended to be more particularized, referring only to judges of the United States District Courts who were appointed under Article III of the Constitution and who enjoy that Article's guarantees of life tenure and undiminished compensation. See 28

U.S.C. 133 (listing district judges to be appointed under Article III, and omitting territorial judges); *id.* at 451 (defining "district court" by reference to Title 28's list of United States district courts and judgeships, which does not include territorial judges or courts).

That understanding of Section 292(a)'s reference to "district judge" is confirmed, as petitioners further explain (Br. 12-14), by Congress's use of the term throughout Title 28 and that Title's distinctive treatment of the District Court for the Northern Mariana Islands and similarly situated territorial courts. See 28 U.S.C. 452-459, 462.

In short, the government agrees with petitioners that Title 28 does not expressly authorize, as a matter of statutory law, the designation of territorial judges to sit on the federal courts of appeals.

B. Petitioners Abandoned Their Statutory Objection To The Composition Of The Ninth Circuit Panel

"No procedural principle is more familiar to this Court" than that a statutory or constitutional right "may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *United States* v. *Olano*, 507 U.S. 725, 731 (1993) (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). The "failure to make the timely assertion of a right" is deemed to be a forfeiture of the right, 507 U.S. at 733, which can be reviewed only for plain error, Fed. R. Crim. P. 52(b). By contrast, "the intentional relinquishment or abandonment of a known right" waives and thereby "extinguish[es]" the right, precluding even plain error review. 507 U.S. at 733 (citation omitted).

At a minimum, petitioners forfeited their statutory objection to the composition of the panel by failing to

raise it before the court of appeals. Petitioners did not challenge the composition of the court of appeals at any time before filing their petitions for writs of certiorari. Petitioners filed no objection to the composition of the court of appeals' panel before oral argument, although the composition of the panel was disclosed eleven days in advance of argument. J.A. 7; see also J.A. 9-12; Ninth Circuit General Order 3.5 ("The composition of panels shall be made public on the first working day of the week preceding argument."). While, five days before the scheduled argument, petitioner Phan communicated with the court her election to forgo oral argument, she voiced no objection to the presence of Chief Judge Munson on the panel that would decide her case. Oral argument was heard in petitioner Nguyen's case, without her counsel voicing any objection to the panel's composition.

In the six weeks that followed before decision in the case, counsel for both petitioners neglected to object to Chief Judge Munson's participation in their cases. Finally, after the court issued a decision affirming their convictions, neither petitioner filed a petition for rehearing or for rehearing en banc, even though a petition for rehearing would have alerted the court to the problem in time to permit reargument of the case before a new panel, and rehearing en banc would have provided precisely the consideration by a full complement of Article III judges that petitioners now say they wanted. See *United States* v. *American-Foreign S.S. Corp.*, 363 U.S. 685, 689-690 (1960) (purpose of rehearing en banc "is to enable the court to maintain its integrity as an institution by making it possible for a majority of its judges always to control" decision-making by the court) (citation omitted).

There is reason to believe, moreover, at least with respect to petitioner Nguyen, that the objections belatedly raised before this Court were knowingly waived below. Chief Judge Schroeder has advised that both she and Judge Goodwin recall counsel for Nguyen approaching them ex parte, the day before oral argument at a meeting of the Guam Bar Association, and mentioning that there might be a problem with Chief Judge Munson sitting on the panel because he is not an Article III Judge.[3] Counsel for Nguyen, who argued before the Ninth Circuit panel the following day, thus seems to have been fully aware that he had a potential legal objection to the panel's composition and yet apparently consciously chose not to raise the issue before the Ninth Circuit at oral argument, during the six weeks after argument, or following the decision. Apparently, "[i]t was only after the judge ruled against them that petitioners developed their current concern over whether his appointment violated * * * the Constitution" or statutory law. *Freytag* v. *Commissioner*, 501 U.S. 868, 892-893 (1991) (Scalia, J., concurring in part and concurring in the judgment).

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[3] The Assistant United States Attorney who represented the United States on appeal advises that counsel for Nguyen subsequently told him about his communication with the judges, and his description of that conversation was the same as Chief Judge Schroeder's.

C. The Designation of Chief Judge Munson To A Court Of Appeals' Panel Sitting In A Territory And Considering Only Cases Arising From That Territory Was Not Plain Statutory Error

Under Federal Rule of Criminal Procedure 52(b), courts have only "a limited power to correct errors that were forfeited because not timely raised" below. *Olano*, 507 U.S. at 731. Under the rule, there must be an "error" that both is "plain" and "affect[s] substantial rights." *Id.* at 732. Even if such an error occurred, this Court should not exercise its discretion to correct the error unless it "seriously affects the fairness, integrity or public reputation of judicial proceedings." *Ibid.* (citation and brackets omitted); see also *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002). The designation of Chief Judge Munson did not amount to plain error.

1. *No Plain Error Occurred*

The United States agrees that error occurred because the relevant statutory provisions, read as a whole, envision only the designation of district judges from United States district courts rather than from the territorial courts.

That error, however, was not plain. Nothing in Title 28 expressly precludes the designation of territorial district judges to sit on court of appeals panels. Nor does Title 28, in authorizing the designation of "district judges" to sit on appellate panels, 28 U.S.C. 292(a), offer a definition of "district judges." Cf. 28 U.S.C. 451 (defining "district court," but not "district judge"). No case authority specifically addressed, let alone forbade, the designation. In fact, Hawaii territorial judges had sat on Ninth Circuit panels for a brief period in the mid-1950s, so the designation was not without precedent. See, *e.g.*, *Irish* v. *United States*, 225 F.2d 3 (9th Cir. 1955); *Chernekoff* v. *United States*, 219 F.2d 721 (9th Cir. 1955); see also *Territorial Judge Assigned Temporarily to United States Court of Appeals*, 69 Harv. L. Rev. 760 (Feb. 1956).[4] The statutory arguments advanced by petitioners for the first time before this Court appear to be matters of first impression never before addressed by any federal court. Finally, the established inapplicability of Article III of the Constitution to cases arising within the territories, see Section IIB, *infra*—the only cases Chief Judge Munson was designated to hear—could have influenced the Chief Judge's understanding of the scope of the statutory designation authority.

2. *Petitioners' Substantial Rights Were Not Affected*

The error in statutory construction did not affect the petitioners' substantial rights. A right is substantial if it affects the outcome of the court's proceedings, *Olano*, 507 U.S. at 734, or if it is a "structural" error "affecting the framework within which the [case] proceeds," *Johnson* v. *United States*, 520 U.S. 461, 468 (1997) (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 310 (1991)). Petitioners bear the burden of establishing prejudice arising from the designation of Chief Judge Munson. *Olano*, 507 U.S. at 734. They have failed to do so.

Petitioners' appeal was heard and decided by two Article III judges, in addition to Chief Judge Munson. Both of those judges agreed that petitioners' challenges to the district court's evidentiary rulings, which are subject to highly deferential abuse-of-discretion review, Pet. App. 4, were without merit. Judge Goodwin,

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[4] The government has been able to identify forty cases on which Judge Wiig, and 24 cases on which Judge McLaughlin, both of the District of Hawaii, sat between 1950 and 1956.

writing for the court, explained that petitioners' evidentiary challenges were "overstate[d]," and that the district court "clearly performed the necessary" analysis. *Id.* at 5. With respect to petitioners' sufficiency of the evidence argument, the judges were also unanimous that "[t]here was plenty of evidence," *id.* at 6, and "abundant facts," *id.* at 5, including the "circuitous" route home from the post office, *id.* at 3, and "the presence of nearly a hundred little plastic zip lock bags and $6,000 in cash in the apartment," *id.* at 6, to reject the defense "picture of two innocent women eagerly opening a Christmas package with no idea of what it contained," *ibid.*

Indeed, in light of the overwhelming evidence of their guilt and the insubstantiality of their challenges to their convictions, it is perhaps understandable that petitioners have made no effort to persuade this Court that any judge—Article III or not—would have resolved their appeal any differently. Nor have petitioners argued that Chief Judge Munson was biased or somehow lacked the legal skills and ability fairly to evaluate their arguments on appeal. See *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (lack of an impartial trial judge is a structural error). Instead, they attempt to meet their burden of showing *actual* prejudice by *hypothesizing* about the potential impact of Chief Judge Munson's presence on the panel's deliberations. Pet. Br. 42-44.

That argument fails. In *Olano*, this Court refused to "presume prejudice" arising from the presence of alternate jurors during jury deliberations, 507 U.S. at 740, even though the Court agreed that such prejudice could arise "[i]n theory" either from the alternates' actual participation "verbally or through 'body language,'" or the chilling affect of their presence in the jury room, *id.* at 739. See also *United States* v. *Myers*, 280

F.3d 407, 413 (4th Cir.) (presence of thirteenth juror throughout jury deliberations was not plain error where defendant did not make "a specific showing of prejudice"), cert. denied, 123 S. Ct. 53 (2002). Likewise in this case, petitioners cannot simply presume prejudice from the presence of Chief Judge Munson on the panel and during deliberations. Petitioners were required to offer "direct evidence" that the votes of the two Article III judges would have changed in his absence. *Olano*, 507 U.S. at 740.

For the same reason, petitioners cannot show that structural error occurred. In fact, petitioners' claim is much more structurally amenable to plain error review than the jury-composition question addressed in *Olano*. The jurors in *Olano* were laypersons charged with finding the facts and making crucial credibility judgments in a criminal trial in the first instance. The ability of judges after the fact to recreate those deliberations and determine how any single individual might have influenced them is highly circumscribed and necessarily speculative, given the wide range of factors that can sway jurors and the fact that hesitation in just one juror can change the outcome of the trial. Here, by contrast, the Ninth Circuit panel was reviewing purely legal arguments on the same appellate record that is before this Court. Indeed, petitioner Phan's appeal was submitted without oral argument, so the record consists exclusively of the papers that are now before this Court. This Court accordingly can readily determine that the evidence of guilt is so overwhelming that no reasonable judge (let alone the necessary two) could have found grounds for reversing the judgments of conviction.

3. *The Error Did Not Affect the Court's Jurisdiction*

Petitioners argue (Br. 33-39) that the error was jurisdictional and, therefore, must be considered by this Court. The judgment under review by this Court, however, is not the judgment of Chief Judge Schroeder, Judge Goodwin, and Chief District Judge Munson. It is the judgment of the United States Court of Appeals for the Ninth Circuit. There is no question that, under the relevant statutory provisions, the Ninth Circuit had subject matter jurisdiction over this appeal, 28 U.S.C. 1294, and the "statutory * * * *power* to adjudicate the case," *Cotton*, 122 S. Ct. at 1785 (citation omitted). See also *Ex parte Ward*, 173 U.S. 452, 454 (1899) (distinguishing between "jurisdiction" of the court, and a particular individual's "right to exercise the judicial functions," where his appointment is challenged under Article III); *Peretz* v. *United States*, 501 U.S. 923, 953 (1991) (Scalia, J., dissenting).

Furthermore, Congress has already determined that the presence of two Ninth Circuit judges on a panel is sufficient to empower that court to exercise jurisdiction over and to act upon a case. 28 U.S.C. 46(d) (two judges constitute a quorum for a court of appeals panel). "A majority of the number of judges thus authorized to constitute the court was present, heard oral argument, and participated in the decision, as provided in 28 U.S.C. § 46(c) and (d)." *Tobin* v. *Ramey*, 206 F.2d 505, 506 (5th Cir. 1953), cert. denied, 346 U.S. 925 (1954).[5]

[5] See also *ASW Allstate Painting & Constr. Co.* v. *Lexington Ins. Co.*, 188 F.3d 307, 309 n* (5th Cir. 1999) ("When one of the three judges of a panel dies or becomes unable to participate, the remaining two judges are authorized to proceed with the determination of the appeal"); *United States* v. *Desimone*, 140 F.3d 457, 458-459 (2d Cir.) (Section 46(d) "requires only that [the quorum] be a majority of a legally authorized panel"), cert. denied, 525 U.S. 874 (1998); *Murray* v. *National Broad. Co.*, 35 F.3d 45, 47 (2d Cir. 1994) (holding that 28 U.S.C. 46(b) "was not intended to preclude disposition by a panel of two judges in the event that one member of a three-judge panel to which the appeal is assigned becomes unable to participate"), cert. denied, 513 U.S. 1082 (1995).

That rule derives from the common-law principle, long recognized by this Court, that "a quorum constituted of a simple majority of a collective body is *empowered* to act for the body" and is "sufficient to perform the function of the body." *FTC* v. *Flotill Prods., Inc.*, 389 U.S. 179, 183 (1967) (emphasis added; citation omitted); see also *id.* at 184 (discussing rule's application to courts); *Pollard & Pickett* v. *Dwight*, 8 U.S. (4 Cranch) 421, 429 (1808) (Marshall, C.J.) (dismissing as having "little foundation" a challenge to the jurisdiction of a court of appeals to act, where the required quorum was present).

Petitioners cite *Ayrshire Collieries Corporation* v. *United States*, 331 U.S. 132 (1947) (Pet. Br. 43), but that case supports the government's position, not petitioners'. In *Ayrshire*, the Court held that the full complement of three judges was necessary to enjoin the enforcement of Interstate Commerce Commission orders because Congress, in the Urgent Deficiencies Act, had specifically directed that such cases "shall be heard and determined by three judges." 331 U.S. at 137. This Court concluded that Congress "meant exactly what it said," *ibid.*, finding it "significant that this Act makes no provision for a quorum of less than three judges" because "[t]wo judges of a three-judge circuit court of appeals * * * ordinarily constitute a statutory quorum for the hearing and determination of cases," *id.* at 138. *Ayrshire* thus stands for the proposition that, where Congress expressly says that "[a]ll

three judges * * * must fully perform the judicial function," *ibid.*, courts cannot permit less. By the same token, when Congress says that a majority—two judges—may act for a panel of three, courts cannot require more.

Petitioners also mistakenly rely (Br. 34, 38-39) on cases where Congress expressly prohibited judges to sit on courts of appeals in certain circumstances. For example, in *William Cramp & Sons Ship & Engine Building Co.* v. *International Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913), this Court considered a federal law providing that "no judge before whom a cause or question may have been tried or heard in a district court * * * shall sit on the trial or hearing of such cause or question in the Circuit Court of Appeals." *Id.* at 649 (citation omitted). This Court held that, when a district court judge sat in contravention of that "comprehensive and inflexible" prohibition, *id.* at 650, the court of appeals was statutorily unable to act. In so holding, however, the Court did not adopt petitioners' proposed categorical rule that any error in panel composition must automatically vitiate a court of appeals' judgment. The Court held only that courts constituted "in violation of the *express prohibitions* of [a] statute" lack the authority to act. *Ibid.* (emphasis added).[6] Again, that holding supports the position that it is the language of the applicable statute that defines a court's

[6] See *Moran* v. *Dillingham*, 174 U.S. 153, 157 (1899) (interpreting the same "positive prohibition of the legislature") (cited at Pet. Br. 34, 38-39); *American Constr. Co.* v. *Jacksonville, Tampa, & Key West Ry.*, 148 U.S. 372, 387 (1893) (enforcing the same statutory prohibition) (cited at Pet Br. 33-34, 38-39); see also *Frad* v. *Kelly*, 302 U.S. 312, 318 (1937) (statute expressly provided that "jurisdiction is vested in the trial court and in no other") (cited at Pet. Br. 34).

power to act. Here, the composition of the panel did not run afoul of any "comprehensive and inflexible" statutory "prohibition," *ibid.*, and Congress has said that the presence of two circuit judges is sufficient for the court to act.

4. *The Error Did Not Seriously Affect the Fairness, Integrity, or Public Reputation of Judicial Proceedings*

Even if this Court concludes that plain error occurred, the Court should not exercise its discretion to afford relief because the presence of Chief Judge Munson did not affect the fairness, integrity, or public reputation of the proceedings on appeal. *Cotton*, 122 S. Ct. at 1786. As an initial matter, Chief Judge Munson's character and abilities as a jurist, peculiarly experienced in adjudicating matters arising within the United States Territories, stand unimpeached. No allegation of actual unfairness, partiality, or lack of judicial acumen has been leveled. It is therefore difficult to understand how fairness or the public reputation of the judicial process is advanced by allowing criminal defendants, whose convictions are supported by "overwhelming" evidence, *ibid.*, to consume the public resources necessary for a second appellate review, where their claims already have been rejected unanimously by a quorum of the court—especially where at least one of those defendants appears to have deliberately refrained from objecting before the court of appeals. "It is exceedingly to be regretted, that exceptions which might be taken in abatement and often cured in a moment, should be reserved to the last stage of a suit, to destroy its fruits." *Turner* v. *Bank of N. Am.*, 4 U.S. (4 Dall.) 8, 11 (1799).

Second, this Court has long held that the "*de facto* officer doctrine confers validity upon acts performed by

a person acting under the color of official title even though it is later discovered that the legality of that person's appointment or election to office is deficient." *Ryder* v. *United States*, 515 U.S. 177, 180 (1995). Where, as with the Ninth Circuit panel here, "an office exists under the law," "it matters not how the appointment of the incumbent is made, so far as the validity of his acts are concerned. It is enough that he is clothed with the insignia of the office, and exercises its powers and functions * * * under color of an election or appointment." *Norton* v. *Shelby County*, 118 U.S. 425, 444-445 (1886); see also *Waite* v. *City of Santa Cruz*, 184 U.S. 302, 322-323 (1902); *McDowell* v. *United States*, 159 U.S. 596, 601-602 (1895); *Wright & Wade* v. *United States*, 158 U.S. 232, 238 (1895); *Ball* v. *United States*, 140 U.S. 118, 128-129 (1891) (citing additional cases).

The purpose of the doctrine parallels the fairness and public integrity concerns underlying this Court's plain error jurisprudence: the *de facto* officer doctrine promotes the public reputation of governmental proceedings by protecting "the public and individuals whose interests may be affected" by reliance on the validity of the court's judgments. *Norton*, 118 U.S. at 441. "The official acts of such persons are recognized as valid on grounds of public policy, and for the protection of those having official business to transact." *Id.* at 445.

In *Ryder*, this Court declined to apply the *de facto* officer doctrine to a claim that two of the three judges serving on the Coast Guard Court of Military Review were appointed in violation of the Appointments Clause of Article II of the Constitution, reasoning that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question." 515 U.S. at 182. But the Court

specifically distinguished from its ruling those prior cases applying the *de facto* officer doctrine where, as here, the objection had not been timely raised before the tribunal at issue and where the objection rested on statutory grounds. *Id.* at 181-182.[7] Petitioners' statutory claims thus remain subject to application of the *de facto* officer doctrine and, as such, the public interest is promoted by rejecting, rather than sustaining, their challenge.[8]

II. PETITIONERS' UNTIMELY CONSTITUTIONAL OBJECTIONS TO THE COMPOSITION OF THE APPELLATE PANEL DO NOT AFFECT THE VALIDITY OF THE JUDGMENT AFFIRMING THEIR CONVICTIONS

A. Outside The United States Territories, Article III Does Not Permit The Appointment Of Non-Article III Judges To Sit On Article III Courts

Petitioners argue at length (Br. 15-27) that the designation of a non-Article III judge to sit on the court of appeals violated Article III by vesting Article III power in an individual not constitutionally qualified to exercise that power. With respect to appeals coming

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[7] Petitioners' argument (Br. 40) that the doctrine is confined to minor defects in title is contradicted by history. See *Ex parte Ward*, 173 U.S. at 453-455 (*de facto* officer doctrine applied where defendant challenged appointment of judge under Article III); *Norton*, 118 U.S. at 446 (*de facto* officer doctrine applies where the appointment is "void because the officer was not eligible, or because there was a want of power in the electing or appointing body").

[8] The *de facto* officer doctrine has special relevance to matters arising within the United States Territories, given the greater likelihood in those jurisdictions for transitional and evolving forms of government, which can result in broad and complicated shifts in governmental personnel.

from lower Article III courts and arising within the United States proper, the government agrees with petitioners that the performance by a non-Article III judge of Article III functions on an "inferior Court[]" exercising general federal jurisdiction would violate Article III of the Constitution. That is because, by exercising general federal jurisdiction within the States of the United States, such courts could not be created pursuant to Congress's power over the Territories, U.S. Const. Art. IV, § 3, or its specialized powers under Article I, Section 8 to provide, for example, for the "Government" of the military. Such courts would have to be created pursuant to the Article I, Section 8, Clause 9 power to "constitute Tribunals inferior to the supreme Court," and Article III specifies that judges on such courts must enjoy Article III's protections of life tenure and guaranteed salary.

In addition, a decision by Congress to populate Article III courts with non-Article III judges would likely violate the separation of powers by enhancing Congress's influence and control over the decision-making of Article III courts, thereby diminishing the authority and independence of such tribunals. Cf. *Mistretta* v. *United States*, 488 U.S. 361, 382, 397-408 (1989). Furthermore, subjecting the decisions of Article III district courts to the review of non-Article III judges— judges who are agents of the Legislative or Executive Branches—would raise distinctive separation of powers concerns. See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1871); *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792). None of those separation of powers concerns affects the validity of the Ninth Circuit's judgment affirming petitioners' convictions, however, because territorial residents like petitioners do not enjoy the protections of Article III.

B. The Protections Of Article III Are Inapplicable To Cases Arising Within The Territories

1. *Article III Did Not Apply to Petitioners' Appeal*

Petitioners' constitutional objection to the Ninth Circuit's judgment fails because the adjudication of cases arising within the United States Territories is not subject to Article III. This Court has made clear that,

> in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

Glidden Co. v. *Zdanok*, 370 U.S. 530, 544 (1962) (plurality opinion) (footnote omitted); see also *McAllister* v. *United States*, 141 U.S. 174, 187 (1891) ("no such guaranties are provided by [Article III] in respect to judges of courts created by or under the authority of Congress for a Territory of the United States"). Indeed, rulings confirming the inapplicability of Article III to the adjudication of territorial cases date back to the earliest days of this Court, and have been consistently applied for 160 years. See, *e.g.*, *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 64-65 (1982) (noting territorial exception to Article III); *Crowell* v. *Benson*, 285 U.S. 22, 50 (1932); *Downes* v. *Bidwell*, 182 U.S. 244, 270 (1901); *McAllister*, 141 U.S. at 179-184 (citing additional cases); *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 242 (1850); *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (Marshall, C.J.). "Only

'fundamental' constitutional rights are guaranteed to inhabitants of * * * [the unincorporated] territories," and petitioners claim no violation of such rights before this Court. *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 268-269 (1990); *Downes*, 182 U.S. at 282-283 (discussing applicable rights).[9]

The reason for Article III's inapplicability is that, when establishing a court system for the Territories, Congress acts in a capacity similar to that of a state government creating a state court system. *Palmore* v. *United States*, 411 U.S. 389, 403 (1973); *Benner*, 50 U.S. (9 How.) at 242. Congress may "legislate for the [territories] in a manner with respect to subjects that would exceed its powers, or at least would be very unusual, in the context of national legislation enacted under other powers delegated to it under Art. I, § 8." *Palmore*, 411 U.S. at 398. Accordingly, the Constitution does not require that either the trial court or the appellate court comply with the strictures of Article III. See, *e.g.*, *id.* at 402-403 & n.11 (citing additional cases). That is true even if the tribunal decides questions of federal law. There is no requirement that only an Article III court can hear and determine questions of federal law. "Very early in our history, Congress left the enforcement of selected federal criminal laws to state courts and to state court judges who did not enjoy the protections prescribed for federal judges

[9] See also *Balzac* v. *Porto Rico*, 258 U.S. 298, 304-305 (1922) (Sixth Amendment right to a jury trial does not apply); *Ocampo* v. *United States*, 234 U.S. 91, 98 (1914) (Fifth Amendment grand jury provision is inapplicable); *Dorr* v. *United States*, 195 U.S. 138, 149 (1904) (right to a jury trial is inapplicable); *Hawaii* v. *Mankichi*, 190 U.S. 197, 218 (1903) (provisions on indictment by grand jury and jury trial are inapplicable); *Downes*, 182 U.S. at 287 (Revenue Clauses of the Constitution do not apply).

in Art. III." *Id.* at 402; see also *Testa* v. *Katt*, 330 U.S. 386, 392 (1947). As with the state court system, this Court remains available to review questions of federal law decided by courts within the territorial system. That is the most protection territorial residents can claim under Article III, and that protection was not transgressed here. Cf. *Olsen*, 431 U.S. at 203-204 (denying Guam litigants access to "any Art. III tribunal" on appeal "of local-court decisions might present constitutional questions").

Accordingly, petitioners' Article III challenge to the court of appeals' judgment fails. Petitioners do not dispute that their cases arose within a United States Territory where Article III does not apply. Petitioners are both residents of the United States Territory of Guam—neither is a resident of any State within the United States; petitioner Nguyen is not even a United States citizen. The criminal conduct of which they were convicted occurred within Guam, and they were tried before a non-Article III territorial court. In hearing petitioners' appeal, moreover, the Ninth Circuit conducted a special sitting in the Territory of Guam and at that sitting adjudicated only cases arising from within Guam. See J.A. 7. As a result, petitioners are no better positioned than a litigant in state court (where, for example, state appellate judges might be elected) to complain that their appeals court lacked the protections of Article III. "Neither has a federal constitutional right to be tried before judges with tenure and salary guarantees." *Palmore*, 411 U.S. at 391.

Looked at another way, whether or not the designation of Chief Judge Munson violated Article III in some general sense, petitioners lack standing to object to that violation because they do not fall within the zone of interests protected by Article III. "As early as 1907,

this Court took the position that remedies for violations of constitutional rights would only be afforded to a person who 'belongs to the class for whose sake the constitutional protection is given.'" *United States* v. *Salvucci*, 448 U.S. 83, 86 (1980) (quoting *New York ex rel. Hatch* v. *Reardon*, 204 U.S. 152, 160 (1907)). Residents of the territories, however, do not enjoy the protections of Article III with respect to cases or controversies adjudicated within the territories. They have no "independent right to adjudication in a constitutionally proper forum" under Article III, and thus have not suffered an "Article III injury." *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 579-580 (1985). Like the Fourth Amendment, an individual's "capacity to claim the protection" of Article III "may depend upon where those people are." *Minnesota* v. *Carter*, 525 U.S. 83, 88 (1998) (quoting *Rakas* v. *Illinois*, 439 U.S. 128, 143 (1978)); see also *Verdugo-Urquidez*, *supra*; *Balzac* v. *Porto Rico*, 258 U.S. 298, 309 (1922) ("It is locality that is determinative of the application of the Constitution, in such matters as judicial procedure.").

It is not enough that petitioners have identified an aspect of their proceedings that would be unconstitutional if applied to someone who is entitled to the protections of Article III in a federal prosecution. "[A] litigant may only assert his own constitutional rights or immunities." *McGowan* v. *Maryland*, 366 U.S. 420, 429 (1961) (citation omitted). Accordingly, however unconstitutional Chief Judge Munson's service would have been for the vast majority of litigants whose cases are heard by the Ninth Circuit, the designation was not unconstitutional under Article III as applied to territorial residents like petitioners. Petitioners received all the constitutional process they were due on appeal. Indeed, petitioners concede that Congress could, consistent with Article III, "create[] an amalgamated court, like the panel that heard cases here." Pet. Br. 26. But if Article I permits exactly the review petitioners received, then Article III cannot forbid it. Because Chief Judge Munson's designation did not run afoul of any Article III right of petitioners, the court of appeals' unanimous judgment remains valid.

2. *Article III's Structural Protections Were Not Violated*

Petitioners attempt to circumvent that barrier to relief by arguing (Br. 26-27) that, once Congress designated the Ninth Circuit to hear appeals from the Guam District Court, the consideration of those appeals had to comport with Article III. But the passage of that *statutory* provision, 28 U.S.C. 1294(4), did not expand petitioners' *constitutional* rights. It did not vest petitioners with an individual, constitutionally protected property or liberty interest in having an Article III-compliant appellate panel. Cf. *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). Nor did the designation of Chief Judge Munson violate any of those fundamental rights, such as equal protection, that petitioners enjoy as residents of the territories. The statute thus created, at best, a statutory expectancy that the panel would comport with Article III—and that is a protection that petitioners forfeited below.

Petitioners further err in contending (Br. 23-25) that the structure of Article III itself inherently forbade the court of appeals panel from hearing these two cases. In *CFTC* v. *Schor*, 478 U.S. 833 (1986), the Court explained that the structural principles enforced by Article III are the separation of powers and "preventing the 'encroachment or aggrandizement of one branch at the expense of the other.'" *Id.* at 850 (quot-

ing *Buckley* v. *Valeo*, 424 U.S. 1, 122 (1976)). But those aspects of Article III have nothing to do with petitioners' claim. Separation of powers principles do not apply within the territories, so petitioners cannot invoke their protections. *Benner*, 50 U.S. (9 How.) at 242 (territorial governments are not subject to the Constitution's "complex distribution of the powers of government"). In any event, this one-time mistaken designation by an officer internal to the Judicial Branch does not remotely raise the specter of inter-Branch encroachment or aggrandizement.

Petitioners' structural argument, moreover, fails to come to grips with the fundamental fact that consideration of appeals from the territories is not a function that the Constitution restricts to Article III courts. See *Northern Pipeline*, 458 U.S. at 63 n.14 ("legislative courts may be granted jurisdiction over some cases and controversies to which the Art. III judicial power might also be extended"). In designating the Ninth Circuit to hear appeals from the District Court of Guam (and, until the establishment of the Guam Supreme Court, from the territorial appellate court of Guam, see 48 U.S.C. 1424-3), Congress acted as much pursuant to its Article IV powers as it did to its Article I power to create inferior federal courts. As petitioners acknowledge (Br. 26), nothing in Article III requires such appeals to be adjudicated by judges appointed pursuant to its provisions. See also *Northern Pipeline*, 458 U.S. at 64-65. Chief Judge Munson, in other words, was fully qualified, as a constitutional matter, to adjudicate petitioners' appeal because he was constitutionally empowered to adjudicate territorial cases both at the trial and appellate level. Petitioners' insistence (Br. 23-24) that Chief Judge Munson had to act under the supervision of an Article III judge or necessarily was

vested with Article III power thus falls wide of the mark.[10]

Nor does anything in Article III preclude its judges from adjudicating territorial cases in conjunction with an Article IV judge. Territorial appeals are not the type of legal questions that inherently must be adjudicated exclusively by Article III panels. *Northern Pipeline*, *supra*; *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 284 (1855). As this Court has observed, moreover, unlike Members of Congress, U.S. Const. Art. I, § 6, Cl. 2 (Incompatibility Clause), nothing in the Constitution forbids Article III judges from performing tasks beyond Article III's enumerated areas of adjudication and serving with non-Article III officials. *Mistretta*, 488 U.S. at 397-400. The question is whether such tasks are consonant with the judicial function and whether they would interfere with the ability of judges to continue to perform their constitutionally assigned adjudicatory roles. *Id.* at 388 ("Congress may delegate to the Judicial Branch non-adjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary."); *id.* at 393 (Congress may assign to the Judicial Branch tasks that "pose no threat of undermining the integrity of the Judicial Branch or of expanding the powers of the Judiciary beyond constitutional bounds").[11]

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[10] In any event, the panel's decision remained subject to supervisory en banc review by the entire Ninth Circuit, yet another option that petitioners deliberately eschewed.

[11] Congress, in fact, has authorized Article III judges to serve temporarily as judges on the District Courts of the Territories of Guam, the Virgin Islands, and the Northern Marian Islands, upon appointment by the Chief Judge of the governing Circuit or the Chief Justice. See 48 U.S.C. 1424b(a), 1614(a), 1821(b)(2). That

Those bounds were not transgressed here. Adjudicating appeals from the territories concerning questions of federal law arising in a federal prosecution is consonant with the Article III function. See U.S. Const. Art. III, § 2 ("The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, [and] the Laws of the United States"); cf. *Morrison* v. *Olson*, 487 U.S. 654, 677 (1988) ("executive or administrative duties of a *nonjudicial* nature may not be imposed on judges holding office under Art. III of the Constitution") (quoting Buckley, 424 U.S. at 123) (emphasis added). Accordingly, "[t]his is not a case in which judges are given power * * * in an area in which they have no special knowledge or expertise." *Morrison*, 487 U.S. at 676 n.13.

Furthermore, the "practical consequences," *Mistretta*, 488 U.S. at 393, of this one-time mistaken designation of territorial judges to sit on a Ninth Circuit panel, under circumstances where no exercise of the Article III power was constitutionally required, did not diminish the Ninth Circuit's ability to perform its core appellate functions or threaten inter-Branch aggrandizement. It is that "practical attention to substance rather than doctrinaire reliance on [petitioners'] formal categories" and broad principles that have no appli-

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service would presumably also include fulfilling the district court's appellate functions by sitting with Article IV District Court judges or territorial judges. See, *e.g.*, *In re Richards*, 213 F.3d 773, 779 (3d Cir. 2000) (explaining composition of the District Court for the Virgin Islands when serving in an appellate capacity). The appellate division of the District Court of Guam historically consisted of a panel of three judges including the District Judges of Guam and the Northern Mariana Islands, and a Circuit or District Judge from the Ninth Circuit. P. Nicolas, *American-Style Justice in No Man's Land*, 36 Ga. L. Rev. 895, 1035 n.931 (Summer 2002).

cation to territorial residents that "should inform application of Article III" in this peculiar case. *Thomas*, 473 U.S. at 587; see also *id.* at 590 (application of Article III should focus on "the nature of the right at issue" in the particular case); *Schor*, 478 U.S. at 857 ("due regard must be given in each case to the unique aspects of the [action] at issue and its practical consequences in light of the larger concerns that underlie Article III"). A realistic appraisal of the inter-Branch consequences of this isolated designation "can only be termed *de minimis*," if not non-existent. *Id.* at 856.

Finally, even if the Court perceives a potential Article III obstacle to the operation of the joint panel, this case provides no occasion to address the limits of congressional power over territorial appeals. That is because Congress did not create this panel; an Article III judge did. Any perceived injury to the integrity or independence of the Judicial Branch thus did not result from either legislative aggrandizement or deliberate judicial abandonment of responsibilities. Cf. *Peretz*, 501 U.S. at 937 (no structural violation of Article III occurs where "the entire process takes place under the district court's total control and jurisdiction, [so] there is no danger that use of the magistrate involves a congressional attempt to transfer jurisdiction [to non-Article III tribunals] for the purpose of emasculating constitutional courts") (internal quotation marks and citations omitted). Full authority to review and correct any resulting injury remained in the en banc Ninth Circuit and in this Court. This case was, at worst, an internal judicial oversight, not an unconstitutional erosion of the entire Judicial Branch's Article III powers.

Any perceived Article III injury was also fleeting. As petitioners note (Br. 17), "the designation of a non-

Article III territorial judge to sit on a Federal Court of Appeals is all but unheard-of." No other court of appeals has shared its authority with non-Article III judges. Before these cases, the Ninth Circuit had not done so for more than half of a century, see note 4, *supra*, and has no apparent intention of doing so again.[12] An opinion from this Court noting the potential constitutional difficulties with such designations should more than suffice to prevent its recurrence. Internal judicial errors, however, should not become the mechanism for imposing restraints on unexercised congressional power.

In short, in light of this Court's well-established principles of constitutional avoidance, an unintentional misstep by a single federal judicial official should not be the occasion for this Court to etch into constitutional stone unnecessary limitations on Congress's "exceptional powers" over territory under its direct authority. *Northern Pipeline*, 458 U.S. at 70. "Particularly in an area of constitutional law such as that of 'Art. III Courts,' * * * rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy." *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment).

C. The Appointments Clause Does Not Affect The Validity Of The Ninth Circuit's Judgment

Petitioners further contend (Br. 27-33) that the designation of a non-Article III judge to sit on the Ninth Circuit panel violated the Appointments Clause

[12] A Ninth Circuit panel sat in the Northern Mariana Islands again this February, but the panel was composed of three Article III judges.

of the Constitution. That Clause provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint * * * Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. The designation of Chief Judge Munson did not violate the Appointments Clause for three reasons.

First, this Court has never held that the Appointments Clause applies to the governance of the United States Territories. The Court has never identified it as one of the fundamental rights enjoyed by residents of the Territories. See *Verdugo-Urquidez*, 494 U.S. at 268-269; *Downes*, 182 U.S. at 282-283. To the contrary, the Appointments Clause, like the protections of Article III, regulates only the framework of the federal government and thus is no more applicable to the Territories than it is to State governments. Accordingly, petitioners are not within the class of persons protected by the Appointments Clause, and transgression of that Clause, if any, cannot invalidate the judgments affirming their convictions in a territorial court.

Second, the limited designation of a territorial judge to sit within a territory and hear appeals in cases from territorial courts does not violate the Appointments Clause. Chief Judge Munson had already been appointed by the President and confirmed by the Senate to adjudicate cases as a district judge for the Northern

Mariana Islands. 48 U.S.C. 1821(b)(1). A circuit judge's designation of district court judges to sit temporarily on a court of appeals panel, 28 U.S.C. 292(a), does not violate the Appointments Clause in its own right. Permitting a territorial judge temporarily to hear cases arising from another territory likewise does not run afoul of the Appointments Clause, any more so than designating a district court judge to sit temporarily in another district. See *Lamar* v. *United States*, 241 U.S. 103, 118 (1916) (explaining the "absolute unsoundness" of the argument that "to assign a judge of one district and one circuit to perform duty in another district of another circuit was in substance to usurp the power of appointment and confirmation vested by the Constitution in the President and Senate").

While designating a territorial judge to hear appeals in cases arising outside the United States Territories might violate the Appointments Clause, because it would significantly expand that judge's functions and judicial capacity, the appellate adjudication of territorial cases was sufficiently germane to Chief Judge Munson's confirmed judicial authority that no new appointment was needed. See *Weiss* v. *United States*, 510 U.S. 163, 174 (1994); *Shoemaker* v. *United States*, 147 U.S. 282, 300-301 (1893) (where territorial officials were already appointed by the President and confirmed by the Senate, a new appointment need not be made where "additional duties, germane to the offices already held by them, were devolved upon them").

This Court adopted just such a context-specific approach to the Appointments Clause in *Weiss*, when it held that service as a military judge is germane to the duties of a commissioned military officer, "[w]hatever might be the case in civilian society." 510 U.S. at 176. Likewise, "[w]hatever might be the case" outside the

territories, it is not necessary for inferior appellate courts to exercise Article III power to adjudicate territorial appeals. Therefore, no expansion of Chief Judge Munson's judicial authority was necessary and no Appointments Clause violation resulted.

Third, the government is aware of no case in which this Court has treated a mistaken construction of a statutory provision, which resulted in an isolated, brief, and, in context, non-substantive alteration in an officer's functions, as an inter-Branch confrontation under the Appointments Clause. There is virtually no historic practice of designating non-Article III judges to sit on court of appeals panels, and no court of appeals has an established policy or practice of doing so. This Court's review of the statutory question posed by petitioners will sufficiently alert the courts of appeals currently not to designate territorial judges to sit on court of appeals panels in the future. Further constitutional adjudication of sensitive separation of powers questions is unnecessary and, therefore, should be avoided. See *Muskrat* v. *United States*, 219 U.S. 346, 359 (1911) (resolution of questions of constitutional power "is legitimate only in the last resort"); *Parsons* v. *Bedford, Breedlove & Robeson*, 28 U.S. (3 Pet.) 433, 448-449 (1830) (Story, J.) (Court should address questions of constitutional power only when "unavoidable").

D. Petitioners Waived Their Constitutional Challenges

By failing to object to the composition of the panel before the court of appeals, petitioners waived their right, if any, to a panel composed entirely of Article III judges. This Court's precedents are clear that, "as a personal right, Article III's guarantee of an impartial and independent federal adjudication is subject to waiver, just as are other personal constitutional rights

that dictate the procedures by which civil and criminal matters must be tried." *Schor*, 478 U.S. at 848-849. See also *id.* at 848 (the Article III "guarantee of an independent and impartial adjudication by the federal judiciary * * * protect[s] primarily personal, rather than structural, interests"); *Peretz*, 501 U.S. at 936-937 ("[T]he Constitution affords no protection to a defendant * * * who fails to demand the presence of an Article III judge at the selection of his jury.").

The requirement that parties raise below their constitutional objections promotes two main purposes, both of which have salience in this case: the promotion of judicial economy by alerting the lower court to a problem at a time when the court may be able to resolve the matter, and preventing parties from pursuing a certain course for tactical reasons and only later, if the outcome is unfavorable, claiming that the court's actions amount to reversible error. See, *e.g.*, *Wainwright* v. *Sykes*, 433 U.S. 72, 89-90 (1977). The contemporaneous objection rule thus ensures that the proceedings below are the "main event," rather than a "tryout on the road" to this Court. *Id.* at 90; see also *Adarand Constructors, Inc.* v. *Mineta*, 534 U.S. 103, 109 (2001) ("[T]his is a court of final review and not first view.") (quoting *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 369 (1996)).

In *Glidden*, *supra*, the plurality opinion reiterated that the rule of waiver "is founded upon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware." 370 U.S. at 535. The Court nevertheless exercised its discretion to address the waived argument concerning the composition of the tribunal in that case, *id.* at 535-536, and in *Freytag*, *supra*. Both of those

cases, however, involved challenges to congressionally created courts that were continuing to operate, thereby creating a significant and ongoing public interest in the prompt resolution of the courts' authority to act. They were, in the Court's words, "rare cases" that warranted a departure from the foundational principle that constitutional rights are forfeited by "the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Olano*, 507 U.S. at 731 (citation omitted).

Here, by contrast, the designation of a territorial judge to sit on a panel of the Ninth Circuit was a one-time, isolated mistake, of which there is no reasonable likelihood of recurrence. There is also reason to believe that petitioner Nguyen's failure to challenge the panel below was deliberate and strategic, rather than inadvertent. In those circumstances, principles of judicial restraint, constitutional avoidance, and the public interest would be ill-served by granting discretionary review.

Petitioners argue (Br. 33-36) that the designation of Chief Judge Munson was structural and jurisdictional error that may not be waived. "But the proposition that legal defenses based upon doctrines central to the courts' structural independence can never be waived simply does not accord with [this Court's] cases." *Plaut*, 514 U.S. at 231; see also *Freytag*, 501 U.S. at 893 (Scalia, J., concurring in part and concurring in the judgment) ("Appointments Clause claims, and other structural constitutional claims, have no special entitlement to review."). If the exercise of Article III powers by a non-Article III judge were an unwaivable structural or jurisdictional defect, there would have been no basis for this Court to exercise its discretion to hear the

claims in *Freytag* and *Glidden*—consideration of those claims would have been mandatory.

Petitioners' argument, moreover, confuses the jurisdictional authority of the court to act with the lawfulness of the manner in which it acted, which is not jurisdictional. See *Ex parte Ward*, 173 U.S. at 454 (distinguishing between "jurisdiction" of the court, and a particular individual's "right to exercise the judicial functions," where his appointment is challenged under Article III); *Peretz*, 501 U.S. at 953 (Scalia, J., dissenting). "It is the *case*, then, and not *the court*, that gives the jurisdiction" under the Constitution. *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 338 (1816) (Story, J.). The panel of the Ninth Circuit Court of Appeals had subject matter jurisdiction to hear this case because it was an appeal from a federal criminal prosecution in federal court. At the same time, the territorial character of the case made it constitutionally permissible for the appeal to be heard by a non-Article III judge.

Petitioners' complaint thus is not with the power of the court to act; it is with the manner in which that court operated. That claim may be waived. Otherwise the Article III limitations on the role of magistrate judges, operating in conjunction with Article III district court judges, in criminal prosecutions, see *Gomez* v. *United States*, 490 U.S. 858 (1989), could not be overcome by a defendant's consent. Yet this Court held otherwise in *Peretz*, *supra*. Consent could not have been dispositive if the magistrate judge's role raised jurisdictional questions.

Likewise, if the exercise of Article III power by a non-Article III judge deprived the court of jurisdiction, this Court would have had to vacate immediately the judgments of the offending tribunals, rather than stay

its own judgments and make them prospective, as the Court did in *Northern Pipeline*, 458 U.S. at 88-89, and in *Buckley*, 424 U.S. at 142-143.

The protections of the Appointments Clause are equally subject to waiver. *Plaut*, 514 U.S. at 232 (citing *Freytag*, 501 U.S. at 878-879). Indeed, in this case, not only did petitioners fail to raise their Appointments Clause argument at any time before the panel or seek rehearing before the en banc Ninth Circuit, they also failed to raise the Appointments Clause argument at the petition stage before this Court. Petitioners' opening brief on the merits is the first time in the history of this litigation that the Appointments Clause has been mentioned. See *Blessing* v. *Freestone*, 520 U.S. 329, 340 n.3 (1997) ("We decline to address these questions which were neither raised nor decided below, and were not presented in the petition for certiorari.").

E. The Presence Of A Non-Article III Judge On The Court Of Appeals Panel Was Not Plain Constitutional Error

Even if petitioners' constitutional objections to the composition of the appellate panel were not waived, the judgment must be affirmed because the designation of Chief Judge Munson was not plain error. The constitutional error—if any, given petitioners' territorial residency—was not plain. No constitutional precedent under Article III squarely addresses whether judgments arising from the territories can be reviewed by a panel composed of Article III and Article IV judges, although historic practice suggests that such mixed panels are permissible. See n.11, *supra*. Petitioners concede (Br. 26) that such review may be constitutionally permissible if prescribed by Congress. Given that concession and the inability of territorial residents to claim the protections of Article III, there is at least a

substantial question whether constitutional error occurred in this case at all. See *Northern Pipeline*, 458 U.S. at 90 (Rehnquist, J., concurring in the judgment) (noting the "frequently arcane distinctions and confusing precedents" in Article III jurisprudence).

In any event, any error did not affect petitioners' substantial rights. For many of the same reasons that petitioners' statutory claim does not amount to plain error, see pages 13-15, *supra*, petitioners have failed to show that the alleged constitutional error resulted in any actual prejudice or affected the fairness, integrity, or public reputation of judicial proceedings, given the overwhelming evidence of their guilt and the insubstantiality of their claims on appeal. As the Court has previously observed, "[r]eversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it." *Johnson*, 520 U.S. at 470 (internal quotation marks and citation omitted).

In short, in the absence of any contention by petitioners either (i) that the outcome of their appeal *actually*, as opposed to hypothetically, could have been affected in any way by Chief Judge Munson's participation, or (ii) that any discernible structural injury to the Judicial Branch occurred, providing relief will do nothing but provide a windfall to defendants who, out of laxity or strategic gamesmanship, waste governmental resources by failing to object in a timely manner to the composition of the court before which they appear. "We do not think that Article III compels this degree of prophylaxis." *Schor*, 478 U.S. at 856.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2003

(9) (8)

Nos. 01-10873, 02-5034

Supreme Court, U.S.
FILED
MAR 17 2003
CLERK

IN THE

Supreme Court of the United States

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Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TUYET MAI THI PHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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March 17, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

27 pp

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CONSOLIDATED REPLY BRIEF OF PETITIONERS

One simple proposition governs these cases: Only Article III judges may sit on Article III courts. Whatever other difficulties may attend the proper interpretation of Article III, § 1, this rule stands as an irreducible constitutional minimum. This Court has never suggested, much less held, that anyone other than Article III judges may staff the Article III courts. The failure to observe this basic precept in these cases violated Title 28; Article III of the Constitution; and the Appointments Clause. The appropriate remedy is to vacate the judgment and remand the cases to be heard by a properly-constituted panel of the Ninth Circuit.

I. THE DESIGNATION OF JUDGE MUNSON WAS ERRONEOUS FOR THREE INDEPENDENT REASONS.

1. The designation of Judge Munson—an Article IV officer of the District Court for the Northern Mariana Islands—to sit on the Ninth Circuit was absolutely unauthorized by the governing statute, 28 U.S.C § 292(a). Pet'r Br. 7-15. Respondent concedes this obvious error, Resp't Br. 8-9—as it must, given the overwhelming statutory authority that compels this conclusion.

2. The statutorily-unauthorized designation of Judge Munson likewise violated Article III. When a case is adjudicated by an Article III court, the members of that court must be Article III officers endowed with Article III protections. *Benner* v. *Porter*, 50 U.S. (9 How.) 235, 244 (1850) ("the judges appointed to administer [the inferior federal courts] must possess the constitutional tenure of office before they can become invested with any portion of the judicial power of the Union"); see also *N. Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (plurality) ("The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III."); Pet'r Br. 15-27.

Respondent asserts that as a general matter, "appeals coming from lower Article III courts and arising within the United States proper" must be heard by Article III courts, and concedes that Article III courts may not be "populate[d] ... with non-Article III judges." Resp't Br. 21-22. It goes on to argue, however, that the unorthodox composition of the Ninth Circuit was constitutional here because these cases arose in the District of Guam. *Id.* at 22-23. This contention fails.

Although it is true that Congress has great leeway in "establishing a court system for the Territories," *id.* at 24; Pet'r. Br. 20 & n.8 (recognizing same), this fact is simply beside the point. These are not cases about "courts created in the territories." *Downes* v. *Bidwell*, 182 U.S. 244, 267 (1901).[1] No challenge has been raised to Guam's court system. These cases present appeals that were to be heard by the Ninth Circuit—which is an Article III court, as Respondent does not dispute. These cases, then, are about the constitutional limitations on the composition of an Article III court. The Ninth Circuit exercises the "judicial power of the United States," and must be staffed with Article III officials. *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 582 (1985) ("federal judicial power shall be vested in courts whose judges enjoy life tenure and fixed compensation"); cf. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 537 (1962) (plurality opinion of Harlan, J.) (in a case involving a panel of the Second Circuit, "the necessity for [an Article III] judge is uncontested").

Contrary to Respondent's argument, this constitutional command has no less force because these cases arrived in the Ninth Circuit pursuant to a statutory designation of jurisdiction. Resp't Br. 27 ("the passage of that *statutory* provision, did not expand petitioners' *constitutional* rights" (citation omitted)). Respondent's argument cannot be correct, for the entire jurisdiction of the lower federal courts is statutorily-created; indeed, those courts are dependent for their very *existence* on statutory grants of authority. U.S. Const. art. III, § 1; *Palmore* v. *United States*, 411 U.S. 389, 401 (1973). Respondent has failed to address this point, cf. Pet'r Br. 26-27 (raising same), and with good cause: On Respondent's reasoning, Article III would have *no* application to the lower federal courts, for the statutory creation of those courts could have no constitutional implications.

This absurd result is not the law. This Court has recognized that, wholly apart from Congress's statutory authority to create and shape the jurisdiction of the lower federal courts, the Constitution protects and defines the nature of those courts:

> The Framers chose to leave to Congress the precise role to be played by the lower federal courts in the administration of justice. But the Framers did not leave it to Congress to define the character of those courts—they were to be independent of the political branches and presided over by judges with guaranteed salary and life tenure.

N. Pipeline, 458 U.S. at 64 n.15 (plurality) (citation omitted). This is only sensible—a federal court of appeals does not transmogrify into some other entity when it hears a certain type of case, or when it "conduct[s] a special sitting," Resp't Br. 25. Once Congress determined that cases like these would be heard by the Ninth Circuit, an Article III court, the Constitution placed limits on the manner in which that court could operate: "The final balance struck is a form of quid pro quo. If Congress desires the stamp of legitimacy that Article III courts provide, it cannot simultaneously undermine that legitimacy by impeding the independence of those courts." 15 *Moore's Federal Practice*, § 100.20[3][c], at 100-41 to -42 (Matthew Bender 3d ed. Mar. 1997) (footnote omitted).

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[1] On this issue, Respondent conflates territorial *courts* and territorial *cases*. It is true that Article III places few if any limits on Congress's power to create territorial *courts*. The cases cited by Respondent stand for this proposition. Resp't Br. 23. It is not true, however, that rulings of this Court "confirm[] the inapplicability of Article III to the adjudication of territorial *cases*," *id.* (emphasis added), regardless of their venue.

As a functional matter, too, Respondent's theory is seriously flawed. When the Ninth Circuit hears appeals from territorial courts, its decisions have the same effect as other Ninth Circuit sittings. These panels hear and decide cases regarding federal law, the federal rules, and the Constitution—as occurred during the Ninth Circuit's February 2002 sitting in the Northern Mariana Islands, see Pet'r Br. 2 n.3 (describing cases). The decisions of such panels are accorded precedential weight by subsequent panels of that court, *United States* v. *Cruz*, 50 F.3d 714, 716 (9th Cir. 1995) (recognizing, in a case arising out of the District of Guam, that the panel's decision creates a circuit split); see *Murray* v. *Cable Nat'l Broad. Co.*, 86 F.3d 858, 860 (9th Cir. 1996) ("'[O]nly a panel sitting en banc may overturn existing Ninth Circuit precedent.'" (alteration in original)), and thereby bind the entire circuit. Contrary to Respondent's logic, therefore, these decisions do in fact apply to litigants in the many States that comprise the Ninth Circuit, as well as in the territories. Thus, on Respondent's theory, adjudicators other than Article III judges may create circuit-wide binding precedent on issues of federal law to be followed by Article III judges. This would raise serious questions about the constitutional separation of powers.[2]

Respondent's theory would create further difficulties. The same logic that would permit non-Article III adjudicators to sit on Article III courts for territorial and military appeals, Resp't Br. 22, would also apply to the numerous administrative appeals over which the federal courts have jurisdiction pursuant to a statute, not a constitutional command. See *Thomas*, 473 U.S. at 589; *N. Pipeline*, 458 U.S. at 67-70 (plu-

[2] Respondent itself concedes that, as a general matter, "to populate Article III courts with non-Article III judges would likely violate the separation of powers" because "subjecting the decisions of Article III [judges] to the review of non-Article III judges ... would raise distinctive separation of powers concerns." Resp't Br. 22. Permitting non-Article III judges to establish precedent that binds Article III judges raises similar concerns.

rality); *e.g.*, 28 U.S.C. §§ 2342-2348 (enumerating agency appeals over which the federal appeals courts have jurisdiction).[3] For example, under Respondent's theory, the D.C. Circuit could create special panels that included non-Article III adjudicators to hear appeals of certain agency orders. Likewise, the Federal Circuit could be staffed by non-Article III judges to hear appeals from the Court of Federal Claims. See 28 U.S.C. § 1295(a)(3). And all of this would occur under the auspices of, and with the imprimatur of, the federal courts of appeals.[4]

[3] The fact that Petitioners are residents of a United States territory and that Nguyen "is not even a United States citizen," Resp't Br. 25, does not change this analysis. *See Zadvydas* v. *Davis*, 533 U.S. 678, 699 (2001) (statute applicable to detention of aliens who have served sentences for criminal violations must be construed to avoid due process concerns).

[4] Respondent's theory of standing likewise falls short, as it simply begs the question. Resp't Br. 25-27. Respondent's contention that Article III has no application to the Ninth Circuit in these cases is not an issue of standing—it is the heart of the merits and, as such, it reduces Respondent's standing argument to the discredited claim that a party has no standing to raise a losing argument. *United States* v. *Richardson*, 418 U.S. 166, 207 (1974) ("to say that [a party] might ultimately lose his lawsuit certainly does not mean that he had no standing to bring it") (Stewart, J., dissenting). In fact, Petitioners satisfy the basic elements of standing, as they allege injury in fact, causation, and redressability. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This is true for Petitioners' statutory claim, which Respondent does not dispute, and with regard to their constitutional claims. Congress creates Article III courts; when it does so, the requirements of Article III and the Appointments Clause must be met with regard to those courts; and when those requirements are not met, individuals who claim an injury as a result of the failure to meet those requirements have standing to raise such claims.

Moreover, this Court has *never* employed the sort of standing analysis that Respondent proposes here with regard to challenges to an adjudicator's Article III authority. On Respondent's theory, standing would have been at issue in every case in which this Court denied a litigant's claim of right to an Article III tribunal. Such an analysis appears nowhere in the relevant case law. *See, e.g.*, *Peretz* v. *United States*, 501 U.S. 923 (1991); *CFTC* v. *Schor*, 478 U.S. 833 (1986); *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985); *United States* v. *Raddatz*, 447 U.S. 667

3. Third, the designation of Judge Munson to sit on the Ninth Circuit violated the Appointments Clause of the United States Constitution. Only an individual nominated by the President and confirmed by the Senate to an Article III court may sit on a federal court of appeals. Pet'r Br. 27-29. Here, that requirement was not met. Judge Munson made his way onto the Ninth Circuit pursuant to the actions of the Chief Judge of the Ninth Circuit.

Respondent does not gainsay this underlying principle. Instead, it argues that the Appointments Clause does not "appl[y] to the governance of United States Territories." This argument misunderstands the constitutional values that the Appointments Clause serves to protect. The Appointments Clause is not simply a personal right, intended to provide a particular litigant with a particular sort of judge. In addition, the Appointments Clause more fundamentally relates to the basic structure of the federal government. It is "among the significant structural safeguards of the constitutional scheme." *Edmond* v. *United States*, 520 U.S. 651, 659 (1997). By limiting the power of appointment, the Clause "ensure[s] political accountability for both the making of a bad appointment and the rejection of a good one." *Id.* at 660; see generally *The Federalist* No. 76 (Alexander Hamilton) (Isaac Kramnick ed., 1987). Simply put—and as the ongoing debates in the Senate regarding confirmation demonstrate—the Appointments Clause allows the electorate to decide where to cast blame. Here, these structural safeguards came into play when Congress vested jurisdiction over these appeals in the Ninth Circuit. Yet the constitutionally-mandated procedure was not followed.

It is of no moment that Judge Munson was previously confirmed to the District Court for the Northern Mariana Islands. The fact that an official has been appointed to one position

(1980); *Palmore* v. *United States*, 411 U.S. 389 (1973). And, practically speaking, claimants like Petitioners are the *only* ones who might conceivably raise such claims.

does not excuse the failure to observe the constitutional requirements of the Appointments Clause with regard to a second, separate position. Pet'r Br. 30-31. Nor, contrary to Respondent's argument, is sitting on the Ninth Circuit "germane to" serving as an Article IV official on the District Court for the Northern Mariana Islands. Resp't Br. 34. These two positions occupy wholly different roles in the constitutional structure—as evidenced by the fact that a territorial judge is not constitutionally qualified to sit on the Ninth Circuit.[5]

Respondent's proposal that germaneness be determined on a case-by-case basis, depending on the subject matter of a particular appeal, is unworkable. To determine germaneness based on the subject matter of a particular case would lead to absurd results, allowing non-Article III officials to sit on appellate courts for cases—but only those cases—concerning the area of their expertise. On that reasoning, FERC Commissioners could sit on the federal appellate courts for energy cases, FCC Commissioners for telecommunications cases, and so on. If the germaneness inquiry has any meaning, surely it must distinguish between Article III and non-Article III officials.

Nor may this error be excused on the theory that it was "limited," Resp't Br. 33, "isolated" and "brief," *id.* at 35; that it was not "deliberate[]," *id.* at 5; or because there is no "policy or practice" of such designations, *id.* at 35. Such limita-

[5] Contrary to Respondent's argument, Resp't Br. 34, this argument casts no doubt whatsoever on the practice of Article III federal district court judges sitting by designation on the courts of appeals. Pet'r Br. 32 n.11. Article III judges have sat by designation since the Judiciary Act of 1789—a fact that is "contemporaneous and weighty evidence of [the Constitution's] true meaning." *Wisconsin* v. *Pelican Ins. Co.*, 127 U.S. 265, 297 (1888), *overruled on other grounds*, *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268 (1935); *see also Lamar* v. *United States*, 241 U.S. 103, 118 (1916) (approving this practice). There is no comparable history (or, for that matter, statutory authority) to support the designation of *non*-Article III judges to sit by designation on Article III courts, and with good reason—this practice violates Article III.

tions, even assuming them to be true, are irrelevant to the Appointments Clause. "'[E]ven the most disinterested assertion of authority'" may lead to "'accretion of dangerous power,'" *Public Citizen* v. *United States Department of Justice*, 491 U.S. 440, 468 (1989) (Kennedy, J., concurring); and, unlike Title VII or § 1983, the Appointments Clause requires no showing of "policy or practice." This Clause is a simple command, speaking "with admirable clarity," and must be obeyed as such. It is not susceptible to the type of "tinkering" or "balancing" that Respondent proposes here. *Id.* at 487 (Kennedy, J., concurring).[6]

For each of these reasons, the designation of Judge Munson to sit on the Ninth Circuit was error.

II. THESE MULTIPLE ERRORS REQUIRE THAT THE JUDGMENT OF THE NINTH CIRCUIT BE VACATED.

Where, as here, an error infects the composition of an appellate panel, this Court's practice is to vacate the decision below and remand for rehearing before a properly-constituted panel. Pet'r Br. 33-36; see *Ayrshire Colleries Corp.* v. *United States*, 331 U.S. 132 (1947); *William Cramp & Sons Ship &*

[6] Respondent also asserts that Petitioners waived their Appointments Clause argument by failing to raise it in their petitions for certiorari. To the contrary, this issue is "fairly included" in the question presented. Sup. Ct. R. 14.1(a); *see* Nguyen Pet. i ("Was the Ninth Circuit's judgment vitiated by the participation of a non-Art. III judge?"); Phan Pet. i (same). Moreover, the petitions for certiorari cited *Ryder* v. *United States*, 515 U.S. 177 (1995), a case that presented an Appointments Clause challenge, Nguyen Pet. 5; Phan Pet. 4-5; Nguyen Reply 4; emphasized that the "challenge is constitutional"; and objected generally to "a non-Art. III judge's *participation*," Nguyen Reply 4-5 (emphasis in original). The Brief for the United States in Opposition also cited *Ryder* and explained that it involved an Appointments Clause challenge. BIO 7.

In a related vein, the claim that Petitioner Nguyen "deliberately" waived her challenges to the composition of the panel in a "strategic" effort at "gamesmanship" is incredible, Resp't Br. 19, 37, 40, given the unlikelihood of review in this Court.

Engine Bldg. Co. v. *Int'l Curtiss Marine Turbine Co.*, 228 U.S. 645 (1913); *Moran* v. *Dillingham*, 174 U.S. 153, 157-58 (1899); *Am. Constr. Co.* v. *Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 (1893). A panel that contains an illegitimate adjudicator is "virtually no court at all." *William Cramp*, 228 U.S. at 652. Accordingly its judgment is "void," for it "affect[s] the administration of justice." *Am. Constr. Co.*, 148 U.S. at 387.[7]

Respondent purports to distinguish this line of authority by proposing a semantic distinction between 1) cases in which a judge's participation contravenes an "'express'" statutory prohibition, and 2) cases like these, in which a judge's participation is merely unauthorized. Resp't Br. 18 (emphasis omitted). This supposed distinction carries no weight, for the simple reason that, under Article III, the "inferior" federal courts may exercise only the jurisdiction that has been specifically granted to them; unless and until Congress grants them jurisdiction, they have none. In other words, *any* exercise of jurisdiction by the inferior federal courts is forbidden unless it has been specifically permitted. Here, Judge Munson exercised authority that was not granted to him—and which was, therefore, forbidden. He was "incompetent to sit at the hearing, the decree in which he took part was unlawful, ... and [it] should certainly be set aside or quashed." *Am. Constr. Co.*, 148 U.S. at 387.[8]

[7] *Ex parte Ward*, 173 U.S. 452 (1899) is not to the contrary. *Cf.* Resp't Br. 16. That case held only that a judge's title cannot be challenged on a writ of habeas corpus. 173 U.S. at 454. Whatever the continued validity of this decision, it does not apply to cases like these, which come before this Court on direct review.

[8] For this reason, the error in these cases cannot be excused by the fact that the panel did contain two competent judges. *See* 28 U.S.C. § 46(d), *cited at* Resp't Br. 16. The defect here was not the absence of a quorum; it was the presence and participation of a statutorily- and constitutionally-disqualified judge. As the courts of appeals have repeatedly held, the presence of one disqualified judge on a multi-member panel requires that the judgment of the panel be vacated. Pet'r Br. 43 n.15 (citing cases);

This argument further ignores principles of statutory construction. Where a statute lists certain items, as 28 U.S.C. § 292(a) and its related provisions do here, it *does* preclude items not listed. *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994) ("*Inclusio unius, exclusio alterius.*"). Respondent's semantic distinction is legally incorrect.

Given the gravity of this error, it is simply extraordinary to suggest that it should be excused as merely "an internal judicial oversight" that was "isolated" and, more remarkable still, "unintentional"—as though Judge Munson appeared on the Ninth Circuit by accident. Resp't. Br. 5, 6, 30, 31, 32. Chief Judge Schroeder's motives (which apparently have been communicated to Respondent, see *id.* at 8), are irrelevant to this inquiry. Moreover, it is rank speculation to suggest that "there is no reasonable likelihood" that this mistake will recur, *id.* at 37; nothing in the record supports this remarkable assertion. It is more extraordinary still to suggest that the error that occurred here be ignored on this basis. Nothing in this Court's precedents supports the notion that an error—whether unique or not—should go uncorrected merely because one party has asserted that it will not recur.[9]

III. ALTERNATIVELY, THE JUDGMENT OF THE NINTH CIRCUIT MUST BE VACATED AS PLAIN ERROR.

Even under the rubric of "plain error," the judgment of the Ninth Circuit must be vacated, as each of the factors set forth in *United States* v. *Olano*, 507 U.S. 725, 731-32 (1993), are satisfied here. The designation of Judge Munson was errone-

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Aetna Life Ins. Co. v. *Lavoie*, 475 U.S. 813, 830-31 (1986) (Brennan, J., concurring); *id.* at 831-33 (Blackmun, J., concurring).

[9] Nor may these issues be avoided simply because they are "delicate and difficult." Resp't Br. 5-6; *accord id.* at 32, 35. The doctrine of constitutional avoidance is meant to guide statutory interpretation, *see* Pet'r Br. 14-15; it does not permit, as Respondent would have it, the wholesale avoidance of squarely-presented constitutional issues that flow from a conceded statutory violation.

ous; it was obviously so; it affected Petitioners' substantial rights; and it affected the fairness, integrity or public reputation of the proceedings. *Id.*

1. The designation of Judge Munson to sit on the Ninth Circuit contravened Title 28, as Respondent concedes. Resp't Br. 8-9. It was likewise erroneous under Article III and the Appointments Clause, as set forth above. See *supra* 1-8.

2. Furthermore, this error was "plain," as is clear from Respondent's very confession of error. The United States Government has determined, at the highest levels, that the statutory error that occurred here is indefensible. It would be unusual indeed for an error to be so obvious to cause the Solicitor General to confess error, yet not obvious enough to be "plain."

Ample statutory authority supports Respondent's confession of error. The plain meaning of 28 U.S.C. §§ 292(a) and 451 precludes Judge Munson from sitting on an Article III court of appeals. Only a district judge may sit by designation on the federal courts of appeals, and Judge Munson sits neither in a "district" nor on a "district court," as those terms are defined by Title 28. Pet'r Br. 7-12. In addition, more than 20 different provisions of Title 28 make absolutely plain that the District Court for the Northern Mariana Islands is distinct from the federal district courts. *E.g.*, 28 U.S.C. §§ 119, 134(a), 333, 371, 373, 376(a)(1)(A) & (B), 452-459, 462, 610, 631, 753, 1291, 1292(a), 1295, 1346(b)(1); Pet'r Br. 12-14. And judicial authority confirms as much. This Court has held that non-Article III territorial courts are not "District Courts of the United States," see *Mookini* v. *United States*, 303 U.S. 201, 205 (1938); and the courts of appeals have likewise determined that such a court is not a "court of the United States," *Talbot* v. *McCarrey*, 218 F.2d 565, 566 (9th Cir. 1955), or a "district court," *United States* v. *Lewis*, 456 F.2d 404, 408 (3d Cir. 1972) (District Court of the Virgin Islands); *Wells* v. *United States*, 214 F.2d 380, 382-83 (5th Cir.

1954) (District Court of the Canal Zone). Given this weight of authority, the error was certainly "plain."

The constitutional errors that occurred here were similarly obvious. It is absolutely unheard-of—with the lone exception of a similar detour by the Ninth Circuit in the 1950s—for anyone other than Article III judges to sit on Article III courts. See *Glidden*, 370 U.S. at 597 (Douglas, J., dissenting) ("[N]o one would go so far as to say that a member of the Interstate Commerce Commission could be assigned to sit on the District Court or on the Court of Appeals."). Whatever difficulties Article III may present in other contexts, there is no ambiguity here. "'[T]he essential attributes' of judicial power" must be held by Article III judges, *N. Pipeline*, 458 U.S. at 81 (plurality), a proposition that serves as the common denominator for each of this Court's opinions to consider the constitutionally-permissible role of non-Article III officials. *E.g.*, *CFTC* v. *Schor*, 478 U.S. 833, 851 (1986); *Thomas*, 473 U.S. at 587, 589-93; *Crowell* v. *Benson*, 285 U.S. 22, 51 (1932). The irreducible minimum of Article III is that Article III courts must be staffed by Article III judges. That basic requirement was not met here.

The violation of the Appointments Clause that occurred here was similarly obvious. With "admirable clarity," *Public Citizen*, 491 U.S. at 487 (Kennedy, J., concurring), the Appointments Clause requires that principal officers be nominated by the President and confirmed by the Senate. Respondent does not dispute that judges of Article III courts are principal officers. Accordingly, it follows, their selection must follow the constitutionally-prescribed procedure. Here, it did not. This error, too, was "plain."

3. Next, this error affected Petitioners' substantial rights. Petitioners satisfy this prong of the test both because the error was "structural" and, alternatively, because prejudice must be presumed under these circumstances. *Johnson* v. *United States*, 520 U.S. 461, 468-69 (1997); *Olano*, 507 U.S. at 739.

The presence of an impermissible adjudicator was structural error, for it "'affect[ed] the framework within which the [cases] proceed[ed].'" *Johnson*, 520 U.S. at 468; Pet'r Br. 37-40. There is nothing more fundamental to the structure of criminal adjudication than the judges and jurors who make up that process. Accordingly, this Court has recognized as a general matter that errors regarding the legitimacy of judges and jurors are structural. *E.g.*, *Tumey* v. *Ohio*, 273 U.S. 510 (1927) (lack of impartial trial judge); *Batson* v. *Kentucky*, 476 U.S. 79, 85-87, 100 (1986) (unlawful exclusion of jurors); *Vasquez* v. *Hillery*, 474 U.S. 254, 263-64 (1986) (unlawful exclusion of grand jurors).

More specifically, this Court has recognized that the type of error that occurred here is structural. *Glidden*, 370 U.S. at 535-37 (plurality) (challenge regarding participation of non-Article III adjudicators on an Article III panel is structural error); see also *Schor*, 478 U.S. at 851; *United States* v. *Albro*, 32 F.3d 173, 174 n.1 (5th Cir. 1994) (per curiam) ("the unauthorized delegation of sentencing authority from an Article III judicial officer to a non-Article III official affects substantial rights and constitutes plain error"). The same is true of Appointments Clause violations. *Freytag* v. *Comm'r*, 501 U.S. 868, 878-79 (1991). As the D.C. Circuit has observed, "Issues of separation of powers (including Appointments Clause matters), seem most fit to the [structural error] doctrine; it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design—the structure—played a causal role in his loss." *Landry* v. *FDIC*, 204 F.3d 1125, 1131 (D.C. Cir. 2000) (citation omitted); see also *Silver* v. *USPS*, 951 F.2d 1033, 1045-46 (9th Cir. 1991) (O'Scannlain, J., dissenting) (Appointments Clause violation regarding 2 of 11 board members requires reversal).

Respondent fails to confront the structural nature of the error that occurred here. Instead, it repeatedly and mistakenly suggests that Petitioners' claim fails because they have not "establish[ed] prejudice." Resp't Br. 13; see also *id.* at 14

(asserting that Petitioners fail "to meet their burden of showing *actual* prejudice); *id.* at 15 (Petitioners failed to put forward "'direct evidence'"). This analysis misunderstands the third prong of the plain error test. Where, as here, structural error has occurred, both *Cotton* and *Johnson* make clear that prejudice need not be proved. *United States* v. *Cotton*, 122 S. Ct. 1781, 1786 (2002); *Johnson*, 520 U.S. at 468-69; see also *Glidden*, 370 U.S. at 533 (plurality) ("Article III, § 1, however, is explicit and gives the petitioners a basis for complaint *without requiring them to point to particular instances of mistreatment in the record*." (emphasis added)); *Landry*, 204 F.3d at 1131 (separation of powers "is a *structural safeguard* rather than a remedy to be applied only when specific harm ... can be identified."). And, for the reasons set forth above, the error that occurred here was structural. In any event, even where no structural error is at issue, certain categories of error lead to a presumption of prejudice, *Olano*, 507 U.S. at 739, and this is just such an error.[10]

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[10] In addition, Respondent's assertion that the trial evidence is overwhelming, is unsupported by the record. The evidence against Petitioners was breathtakingly thin. It showed that Phan picked up a package at the post office and took a "circuitous" route home, but did not open the package contained within the mailing (wrapped like a present) that concealed the drugs. The evidence suggested that Nguyen opened the "present," because she was arrested with dye-stain on her hands from the controlled-package delivery. The *only* other evidence was that the return address on the package matched that on the California driver's license of Nguyen's brother (who is also Phan's nephew). No other evidence was presented regarding any communications (whether by telephone, mail or otherwise) between parties in California and Petitioners in Guam. No evidence was presented regarding on-going drug dealing or other intent to distribute the drugs that were mailed to Guam by an unknown person. Accordingly, Petitioners challenged the sufficiency of the evidence, and the admission of the fact that the holder of the California driver's license was Nguyen's brother and Phan's nephew. Petitioners also objected that, as to the evidence of familial relations, their prejudice objection was never answered by Judge Unpingco—who merely ruled that the evidence was probative, rather than undertaking the required balance of its potential prejudicial effects. *See* Fed. R. Evid. 403.

As set forth in Petitioners' opening brief, where challenges to the authority of a judge are concerned, this Court has either presumed prejudice or required no showing of prejudice. Pet'r Br. 38-40, 42-44. In *Ayrshire Collieries*, the Court overturned the judgment of an improperly-constituted court of appeals precisely because it could not "say that the failure of the third judge to participate in the determination of a case, where the other two are in agreement as to the result, is without significance." 331 U.S. at 139. In *Moran*, it "set aside and quashed" the decision of the circuit court "without considering whether that decree was or was not erroneous in other respects." 174 U.S. at 158 (emphasis omitted). Likewise, the federal courts of appeals have declined to inquire into prejudice when the partiality of one member of a multimember panel is called into question. *E.g.*, *Berkshire Employees Ass'n of Berkshire Knitting Mills* v. *NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); Pet'r Br. 43 n.15 (citing additional cases).[11] This only makes sense, as it is impossible to determine what effect the challenged judge had on the outcome of the case, and it would be unseemly to undertake the necessary inquiry into the minds of the judicial decisionmakers to determine prejudice.

Olano demonstrates precisely why prejudice must be presumed here. In *Olano*, alternate jurors were improperly included in jury deliberations, an error that the Court reviewed for "plain error." 507 U.S. at 740. The Court declined to presume prejudice, noting that "the 2 alternate jurors were indis-

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Moreover, the opinion of the Ninth Circuit is incorrect in an important respect. It treats as significant circumstantial evidence of drug dealing the fact that $6000 was recovered during the arrest. However, the agent who performed the search recanted that testimony on cross-examination. Evidence concerning the recovery of the money was *not* cited by the United States in its brief to the Ninth Circuit, but nonetheless appeared in the opinion of the court and in Respondent's brief, *see* Resp't Br. 14.

[11] Similarly, judges are disqualified not just for actual, proven impropriety, but also for the *appearance* of impropriety: "'[J]ustice must satisfy the appearance of justice.'" *Lavoie*, 475 U.S. at 825.

tinguishable from the 12 regular jurors," and enumerating the ways in which the regular and alternate jurors were qualitatively identical. *Id.* The situation in *Olano* stands in marked contrast to the present cases, for Judge Munson is categorically distinct from the Article III judges who could rightfully have occupied his seat on the panel. Because he is not an Article III judge, he is statutorily and constitutionally prohibited from sitting on the Ninth Circuit. He does not possess life tenure. His salary is not guaranteed. In short, he is different in status and qualification from the Article III judges who might properly have sat on that panel. Unlike the *Olano* jurors, his participation was illegitimate as a threshold matter.

Furthermore, in *Olano* the jury was admonished that the alternate jurors should not participate in jury deliberations. Because jurors are presumed to obey instructions, it was appropriate to presume that the alternate jurors had not affected the deliberations of the jury. *Id.* Here, the opposite presumption obtains: It *must* be presumed that Judge Munson participated in the process of rendering judgment. After all, the "essence of the judicial function" is "the actual adjudication of the issues of law and fact." *Ayrshire Collieries*, 331 U.S. at 139. The very purpose of Judge Munson's participation was to engage in the deliberative process of appellate decisionmaking—to "exchange[] ideas and arguments in deciding the case." *Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813, 831 (1986) (Brennan, J., concurring). It would be demeaning to Judge Munson to presume that he played no role in the adjudication of these cases.

It is precisely because appellate decisionmaking is both deliberative and secret that prejudice must be presumed in cases like these. It can never be known what effect a particular judge had on the deliberations, reasoning, and ultimate decision of an appellate panel—absent, of course, an evidentiary investigation that would require the testimony of the judges involved. The practical impossibility of such an inquiry is strikingly illustrated by the improper, extra-record asser-

tions—based themselves on *ex parte* communications—that populate Respondent's brief. *E.g.*, Resp't Br. 8, 11. Even leaving aside the absolute impropriety of these communications and this line of argument,[12] they demonstrate why an inquiry into prejudice is inappropriate where judicial conduct is concerned: A proper record cannot be created; evidence cannot be tested. In addition to the unseemliness of asking a judge to appear for a deposition in connection with his or her official duties, the inquiry itself would be profoundly disrup-

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[12] The argument that Petitioner Nguyen waived her challenge because of the supposed contents of a conversation between her attorney and Chief Judge Schroeder must be rejected, for it is not properly before this Court. This argument is premised entirely on extra-record evidence, which may not be considered. *Hopt* v. *Utah*, 114 U.S. 488, 491-92 (1885) ("The lawfulness of the conviction and sentence of the defendant is to be determined by the formal record ...; and not by *ex parte* affidavits of private conversations supposed to have afterwards taken place in his absence between the counsel and the clerk."); *see New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970) ("None of this is record evidence, and we do not consider it."); *Russell* v. *Southard*, 53 U.S. (12 How.) 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record.").

Moreover, Respondent failed to raise any such argument in its Brief in Opposition to Petitioner Nguyen's Petition for a Writ of Certiorari. (Instead, Respondent made only the somewhat inconsistent argument that Petitioner's challenge to the composition of the panel was forfeited because it was *not* raised below. BIO 5.) Accordingly, Respondent's new argument is waived: "Any objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." Sup. Ct. R. 15.2; *see City of Okla. City* v. *Tuttle*, 471 U.S. 808, 816 (1985).

Finally, given the *ex parte* communications in which counsel for Respondent and Chief Judge Schroeder seem to have engaged, these cases must be remanded to a different panel of the Ninth Circuit. Chief Judge Schroeder, who has continuing jurisdiction over these cases on remand, has communicated with one of the parties during the course of drafting its brief before this Court. Accordingly, the cases should be remanded to a different panel. See 28 U.S.C. § 455(a) (requiring recusal of a judge whose "impartiality might reasonably be questioned").

tive. An inquiry into the judicial decisionmaking process should be avoided by treating the error as harmful.

However, if this Court determines that an inquiry into prejudice is necessary, then the proper remedy is a remand for a hearing regarding the deliberations of the panel that heard these cases. Petitioners have had no opportunity to demonstrate that they were actually prejudiced by the participation of Judge Munson on the panel that heard their cases and, if a showing of prejudice is required, they should be afforded the opportunity to question the judges regarding Judge Munson's participation in the decisionmaking process.

4. Finally, this error affected the fairness, integrity or public reputation of the proceedings. These cases were adjudicated by a judge who was statutorily disqualified from doing so. The importance of this fact cannot be overemphasized. The composition of the Ninth Circuit in these cases was *illegal* and *unconstitutional*. Such a fact speaks directly to the integrity and public reputation of the proceeding, as this Court has repeatedly recognized.[13] In *William Cramp*, the Court held that a statutory defect in the composition of the appellate panel rendered it "virtually no court at all," and resulted in an "error of so grave a character, and involving considerations of public importance," that vacatur was required. 228 U.S. at 650, 652. Likewise, in *American Construction Co.*, the Court determined that the participation of a statutorily-disqualified judge "deeply affect[ed] the administration of justice in the Circuit Court of Appeals." 148 U.S. at 387.

It is no answer that "Judge Munson's character and abilities as a jurist ... stand unimpeached." Resp't Br. 19. See *Glid-*

[13] Unlike *Cotton*, 122 S. Ct. at 1786-87, the requested relief in these cases would not threaten the "'fairness, integrity, and public reputation of judicial proceedings.'" It is not the case, as it was in *Cotton*, that Petitioners necessarily would receive a lesser sentence. Instead, Petitioners request only a rehearing of their appeals before a different, and properly constituted, panel of the Ninth Circuit.

den, 370 U.S. at 533 (plurality); *id.* at 589-90 (Douglas, J., dissenting) ("The decision in these cases has nothing to do with the character, ability, or qualification of the individuals who sat on assignment.... The problem is an impersonal one, concerning the differences between an Article I court and an Article III court."). This argument is flawed in its presumption that Judge Munson is substantively equivalent to an Article III judge. As noted in the brief of *Amicus Curiae* Thomas K. Moore (a judge of the District Court of the Virgin Islands, who is statutorily and constitutionally equivalent to Judge Munson for present purposes), the neutrality of territorial judges *has* been questioned, because they are beholden to the President for reappointment: "[T]he mere perception that territorial judges might be subject to political pressure undermines the public's confidence in the independence of the judiciary." Thomas Moore Br. 1; see also *id.* 11 (noting that territorial judges are not "fully independent"); *id.* 12-13 (noting media reports that Judge Moore may not be reappointed as a result of certain rulings against the United States). Judge Moore's brief is a practical expression of the theory that underlies Article III: Article III courts must be filled exclusively by Article III judges possessing life tenure and an undiminished salary, in order to guarantee those judges independence from the Executive Branch.

In any event, to accept the suggestion that the error here should be forgiven based on Judge Munson's "character and abilities," would send this Court careening down a slippery slope, for the argument has no limiting principle. An Article IV judge stands in precisely the same shoes, for purposes of this analysis, as Article I adjudicators—including magistrate judges, bankruptcy judges, administrative law judges, and even officials of administrative agencies. Surely those officials may not populate the Article III courts, regardless of their "abilities." The only relevant inquiry is whether the adjudicator is an Article III judge. If not, the fact that he wears a robe and bears the title "judge" cannot preserve the integrity

of the invalid proceedings, regardless of his "character." *Glidden*, 370 U.S. at 604 (Douglas, J., dissenting) ("[W]e subtly undermine the constitutional system when we treat federal judges as fungible.").

Indeed, Respondent's suggestion that the judgment below be affirmed based on Judge Munson's supposed equivalence with an Article III judge is flatly incompatible with this Court's longstanding practice of vacating the decisions of improperly-constituted appellate panels. In the numerous cases cited above, see *supra* at 8-9; see also Pet'r Br. 33-36, 38-40, this Court has vacated outright the decisions of such panels.[14] Whether such an error is deemed "jurisdictional," "structural," "presumed prejudice"—or, to use the terminology of this Court's earlier cases, an error that rendered the panel's decision "void"—it remains clear that an inquiry into prejudice is inappropriate. The proper remedy is vacatur and remand to a new, properly-constituted panel of the Ninth Circuit.

CONCLUSION

For the foregoing reasons, the judgments of the Ninth Circuit should be vacated and remanded for rehearing before a new, properly-constituted panel of that court.

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[14] For these same reasons, Respondent's argument regarding the *de facto* officer doctrine should be rejected. Respondent advocates the most expansive possible reading of this antiquated doctrine, and would permit *anyone* to sit on an Article III court, regardless of their qualifications, so long as they have color of title. Resp't Br. 20. This reading of the doctrine undermines the requirements of Article III; stands at loggerheads with this Court's practice of voiding the judgments of improperly-constituted appellate panels; and relies on an interpretation of nineteenth-century cases that is inconsistent with this Court's more recent discussion of the doctrine. *See, e.g.*, *Glidden*, 370 U.S. at 535-36 (plurality). At most, this doctrine should be viewed as a species of forfeiture, which would not affect these cases for the reasons stated above.

Respectfully submitted,

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March 17, 2003

(10) (9)

Nos. 01-10873, 02-5034

FILED
21
FEB 21 2003
CLERK

In The
Supreme Court of the United States

KHANH PHUONG NGUYEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

TUYET MAI THI PHAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THOMAS K. MOORE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*

Thomas K. Moore is a territorial district judge of the District Court of the United States Virgin Islands.[1] Moore has lived and practiced law in the Virgin Islands for more than twenty-seven years. In the routine exercise of the judicial power of the United States, he and the other three territorial district judges, Raymond Finch (VI), John Umpinco (Guam) and Alex Munson (CNMI), adjudicate disputes between their appointing authority – the executive branch of the United States – and their local governments, corporations, and individuals. They decide all disputes to the best of their ability without regard to any impact a decision may have on reappointment after their ten-year terms. These territorial district judges are appointed by the President and confirmed by the Senate to exercise the very same Article III jurisdiction a United States district judge wields in a State. Accordingly, they should never have to consider, if only to dismiss, the possible impact of their decisions on their reappointments. Moreover, the mere perception that territorial judges might be subject to political pressure undermines the public's confidence in the independence of the judiciary.

The lack of full Article III status of the territorial federal judges is but one aspect of the lesser status of

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[1] In conformity with Supreme Court Rule 37.3(a), *amicus* has obtained the consent of the parties to the filing of this brief and letters of consent have been filed with the Clerk. *Amicus* also states, pursuant to Supreme Court Rule 37.6, that no party or counsel for a party has authored this brief in whole or in part, and that no person or entities other than *amicus* and counsel have made a monetary contribution to the preparation or submission of this brief.

United States citizenship in the unincorporated territories. The territories and possessions are the last locations within the United States in which Congress and the Executive can legally discriminate against a United States citizen because of her place of birth and location. A citizen located in an unincorporated territory has no constitutional right to a criminal or civil trial by jury, to indictment by grand jury, or to trial before a fully independent Article III judge. The unsupportable basis for the continued second-class citizenship in the unincorporated territories was wholly judge-crafted in a series of racially and culturally prejudiced cases. Known as the *Insular Cases,* these decisions began in 1901 with *Downes v. Bidwell*, 182 U.S. 244, and concluded in 1922 with *Balzac v. Porto Rico*, 258 U.S. 298. Having dealt with the consequences of the *Insular Cases* for the past ten years, Moore has first-hand familiarity with the issues petitioners have raised. His arguments in this brief are based on this expertise and careful review of this Court's decisions. Moore's interest in this litigation is to support the principle of equality under the law and to secure the application of Article III of the Constitution for the benefit of the loyal United States citizens who reside in the unincorporated territories. He submits this brief solely on his own behalf and not in his official capacity as judge of the District Court of the Virgin Islands.

SUMMARY OF ARGUMENT

The designation of the Honorable Alex Munson, judge of the District Court of the Commonwealth of the Northern Mariana Islands ["CNMI"], to sit on a panel of the Court of Appeals for the Ninth Circuit does indeed raise significant constitutional questions, most importantly the

continuing validity of the *Insular Cases* and the so-called plenary power of Congress to violate Article III in three remaining insular territories – Guam, the CNMI, and the Virgin Islands. Congress has circumvented Article III by granting the territorial district judges[2] the jurisdiction of United States district judges, whereby they in fact exercise the "judicial Power of the United States," without giving them the full protection under Article III of appointment during good behavior and compensation that Congress cannot diminish. It is not true, as petitioners argue, that only judges possessing these two attributes may exercise Article III judicial power. Judge Munson and the three other territorial judges exercise the judicial power of the United States day in and day out. This Court should reject the racially and culturally biased decisions of a different era and overrule the *Insular Cases*, at least to the extent of curtailing the power of Congress under Article IV to create *de facto* Article III courts in these three possessions without the full scope of judicial independence required by Article III.

In 1962, this Court ruled that the judges of tribunals created by Congress to carry out its Article I functions of paying the debts of the United States and collecting taxes and duties were Article III judges. *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962). This Court should similarly hold that the territorial judges are Article III judges. These judges presently possess all of the essential attributes of Article III

[2] The terms "territorial judges" and "territorial district judges" refer to the federal judges appointed to the district courts of Guam, the CNMI, and the Virgin Islands, as established by Congress in Title 48 of the United States Code. By statute, these territorial judges serve ten-year terms and receive the same compensation as a U.S. district judge.

United States district judges under the criteria of the Court's precedent, with the exception of life tenure and constitutionally protected compensation. These characteristics Congress cannot withhold under the Constitution. The territorial judges exercise only powers of a judicial nature in constitutional cases and controversies. They have no extrajudicial administrative or legislative powers, and their decisions are not subject to extrajudicial revisory authority incompatible with the limitations on the judicial power of the United States contained in Article III of the Constitution. These judges have the same exacting responsibilities as all other United States district judges. The only distinction between the district judges exercising federal jurisdiction in the territories and the judges of the United States district courts in the States is that Congress has plenary power over the former. Once the *Insular Cases* are overruled, this distinction will evaporate. This Court should welcome the opportunity to relegate the *Insular Cases* to the dustbin of our prejudiced past alongside Jim Crow laws and the doctrine of "separate but equal."

The 1828 statement of Chief Justice Marshall in *American Insurance Co. v. 356 Bales of Cotton* [*Canter*], 26 U.S. (1 Pet.) 511 (1828), that territorial judges are incapable of receiving the judicial power of the United States, has also been overtaken by time and changed circumstances and was rejected by this Court in *Glidden*. The Congress has in fact anointed the remaining four territorial judges with the judicial power of the United States, and these judges have in fact been exercising that Article III judicial power for many years. This Court should rule that the *Insular Cases* erroneously purported to grant Congress plenary power over what this Court proclaimed to be "unincorporated territories" and hold that Congress has established *de facto* Article III territorial judges without

including all of the attributes required by Article III. It is past time for this Court to curtail the so-called plenary power of Congress over the territories as it applies to Article III and to declare that the four territorial district judges are in fact and law Article III judges.

ARGUMENT

I. THE RACIALLY BIASED *INSULAR CASES* MUST BE OVERRULED TO THE EXTENT THAT THEY BAR THE APPLICATION OF ARTICLE III TO THE TERRITORIES

The bedrock constitutional principle of mutual independence and separation of the legislative, the executive, and the judicial departments of the federal government is routinely violated in the unincorporated territories and possessions of the United States. Article III provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for thier Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. CONST. art III, § 1. The *Insular Cases*[3] permit Congress to circumvent Article III of the Constitution by

[3] Also known as the *Insular Tariff Cases*, eight Supreme Court cases decided in 1901 make up the core *Insular Cases*: *DeLima v. Bidwell*, 182 U.S. 1 (1901); *Goetze v. United States*, 182 U.S. 221 (1901);

(Continued on following page)

allowing the President to appoint non-life tenured territorial district judges in Guam, the CNMI, and the Virgin Islands. These judges exercise the judicial power of the United States without full constitutional assurance of independence and protection from the coercive influence of the Executive and Congress.

Over 100 years ago, just after the Spanish-American War, this Court fashioned in the *Insular Cases* the doctrine of the "unincorporated territory" to accommodate the acquisition of several non-contiguous insular territories populated by non-white, non-Anglo-Saxon, non-European people. The Court reasoned that these island territories, including Puerto Rico and the Philippines, were populated by peoples who were incapable of coping with the sophistications of democratic and republican forms of government because their racial and ethnic heritages differed so

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Dooley v. United States, 182 U.S. 222 (1901) (*Dooley I*); *Armstrong v. United States*, 182 U.S. 243 (1901); *Downes v. Bidwell*, 182 U.S. 244 (1901); *Huus v. New York & Porto Rico S.S. Co.*, 182 U.S. 392 (1901); *Dooley v. United States*, 183 U.S. 151 (1901) (*Dooley II*); and *Fourteen Diamond Rings v. United States*, 183 U.S. 176 (1901).

A second set of cases, decided between 1903 and 1914, further developed the *Insular Cases*: *Hawaii v. Mankichi*, 190 U.S. 197 (1903); *Gonzales v. Williams*, 192 U.S. 1 (1904); *Kepner v. United States*, 195 U.S. 100 (1904); *Dorr v. United States*, 195 U.S. 138 (1904); *Mendezona v. United States*, 195 U.S. 158 (1904); *Rassmussen v. United States*, 197 U.S. 516 (1905); *Trono v. United States*, 199 U.S. 521 (1905); *Grafton v. United States*, 206 U.S. 333 (1907); *Kent v. Porto Rico*, 207 U.S. 113 (1907); *Kopel v. Bingham*, 211 U.S. 468 (1909); *Dowdell v. United States*, 221 U.S. 325 (1911); *Ochoa v. Hernandez*, 230 U.S. 139 (1913); *Ocampo v. United States*, 234 U.S. 91 (1914). The series culminated in 1922 with *Balzac v. Porto Rico*, 258 U.S. 298 (1922). *See* Christina Duffy Burnett, *A Note on the Insular Cases in* FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 389 (Christina Duffy Burnett & Burke Marshall, eds., 2001).

radically from the majority population of the United States at the turn of the Twentieth Century.[4]

As a distinguished constitutional scholar has noted, the

> *Insular Cases* should be placed . . . within the sadly rich history of American racism or, perhaps more to the point . . . , the view that to be a "true American" one had to share certain racial, religious, or ethnic characteristics.[5] No one can read *Downes* without realizing the extent to which the "un-Americanness" of the people in the new American territories is fundamental to the outcome.

Sanford Levinson, Installing the *Insular Cases* into the Canon, in FOREIGN IN A DOMESTIC SENSE: PUERTO RICO, AMERICAN EXPANSION, AND THE CONSTITUTION 131 (Christina

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[4] Guam and the Virgin Islands have been declared by Congress to be unincorporated territories of the United States, *see* 48 U.S.C. §§ 1421a (Guam), 1541(a) (Virgin Islands). The CNMI, for purposes of this brief, is treated as an unincorporated territory insofar as the judge of the District Court of the Northern Mariana Islands exercises the same judicial Power of the United States. Puerto Rico is not discussed here because its equivalent territorial judges already are full Article III judges.

[5] *See generally* Rogers Smith, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 3 (1997) (noting, for example, the presence of an influential ideology, especially prevalent, during the period of the *Insular Cases*, that "America was by rights a white nation, a Protestant nation, a nation in which true Americans were native-born men with Anglo-Saxon ancestors").

Levinson, at 138 n.44.

Duffy Burnett & Burke Marshall, eds., 2001) (footnote in original).

A new theory was therefore developed to ensure that the Constitution did not "follow the flag," and that the newly acquired lands inhabited by these alien people would not automatically become States of the Union.[6] Justice Brown first articulated the unincorporation doctrine:

> If those possessions are *inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought*, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.
>
> We are therefore of opinion that the island of Porto Rico is a territory appurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution. . . .

Downes v. Bidwell, 182 U.S. 244, 287 (1901) (Brown, J.) (emphasis added).[7]

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[6] *See* Hon. Jose A. Cabranes, *Puerto Rico: Colonialism and Constitutional Doctrine*, 100 HARV. L. REV. 450 (1986).

[7] Additional quotes directly from the *Insular Cases* demonstrate the intrinsically racist imperialism of a previous era of U.S. colonial

(Continued on following page)

Justice Brown, and ultimately the full Court, found the following proposition to have been established by precedent: "that the judicial clause of the Constitution has no application to courts created in the territories, and that with respect to them Congress has a power wholly unrestricted by it." *Id.* at 267. The primary precedent relied on was Chief Justice Marshall's statement that the territorial judges in the then territory of Florida were not judges on "which the judicial power conferred by the Constitution on the general government[] can be deposited. They are incapable of receiving it." *American Ins. Co. v. 356 Bales of Cotton* [*Canter*], 26 U.S. (1 Pet.) 511, 546 (1828).[8]

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expansionism embodied in these outdated and universally criticized decisions:

> [Even] if these inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, *whether savages or civilized*, are such, and entitled to all the rights, privileges and immunity of citizens. If such be their status, the consequences will be extremely serious.

Downes, 182 U.S. at 279 (Brown, J.) (emphasis added).

On the right to jury trial in the Philippines, the Court observed:

> If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends . . . [and i]f the United States, *impelled by its duty or advantage, shall acquire territory peopled by savages* . . . , it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice.

Dorr, 195 U.S. at 148 (emphasis added).

[8] Justice Brown in *Downes* chose to follow *Canter*, rather than Chief Justice Marshall's statement eight years earlier in *Loughborough v. Blake*, 18 U.S. 317 (5 Wheat.) 317 (1820), that the power to tax given to Congress under Article 1, § 8, of the Constitution extends throughout the United States, "which is composed of States and territories." *Id.* at 319.

It is essential to keep in mind that the same Justices who decided the *Insular Cases* had announced several years earlier the "separate but equal" doctrine of *Plessy v. Ferguson*, 163 U.S. 537 (1896), which has been thoroughly repudiated and overruled by *Brown v. Board of Education*, 347 U.S. 483 (1954). Many of the same racial and cultural attitudes and prejudices underpin the reasoning of both doctrines. More enlightened members of this Court recognized in *Brown* that attitudes evolve over time and that the "common wisdom" on the psychological impact of separate schools on African-American children was different in 1954 than when *Plessy* was decided in 1896.[9]

Not surprisingly, the *Insular Cases* have been severely criticized because they are based on racist and ethnocentric precepts that violate the very essence and foundation of our system of governance, as embodied in the Declaration of Independence and repeated over and over in such documents as the Gettysburg Address and the Civil Rights Laws. *See, e.g., Torres v. Puerto Rico*, 442 U.S. 465, 475-76 (1979) (Brennan, J., concurring); *Reid v. Covert*, 354 U.S.

[9] Further evidence that the *Insular Cases* simply cannot withstand any reasoned and principled analysis is Justice Brown's suggestion that among the "artificial or remedial rights" in the Constitution that are "unnecessary to the proper protection of individuals" and would not apply in an unincorporated territory is the right to a particular method of procedure, such as the right to jury trial. He wrote that this right is "peculiar to Anglo-Saxon jurisprudence, and . . . [had] already been held by the states to be unnecessary to the proper protection of individuals." *Id.* at 282-83. This Court has since held that the right to jury trial is a fundamental right incorporated in the Fourteenth Amendment's Due Process Clause and thereby applicable to the States. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1958), *overruling Palko v. Connecticut*, 302 U.S. 319, 324-25 (1937).

1, 14 (1957) (plurality opinion) ("[I]t is our judgment that neither the [*Insular Cases*] nor their reasoning should be given any further expansion. The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government."). The *Insular Cases* have never been repudiated, however, and continue to deprive United States citizens in Guam, the CNMI, and the Virgin Islands of their constitutional right to fully independent United States district judges. The *Insular Cases* have allowed Congress to anoint territorial judges with the judicial power of the United States without also cloaking them with the full independence Article III requires.[10]

[10] These cases affect life in the territories in many other pernicious and detrimental ways. A basic principle of the *Insular Cases* is that "[i]t is locality that is determinative of the application of the Constitution, in such matters as judicial procedure [*e.g.*, trial by jury], and not the status of the people who live in it." *Balzac v. Porto Rico*, 258 U.S. 298, 309 (1922). Even citizens born in a State of the United States are stripped of their constitutional right to jury trial and indictment by grand jury as soon as they get off the plane in Guam, the CNMI or the Virgin Islands. *See United States v. Ntreh*, 279 F.3d 255, 256 (3d Cir. 2002) (relying on the *Insular Cases* to rule that, "[a]s a preliminary matter, we note that residents of the Virgin Islands have no constitutional right to indictment by a grand jury"). Ironically, a United States citizen is afforded *more* constitutional rights when she visits or resides in a foreign country than when she is in a United States territory. *See Reid*, 354 U.S. at 11-14, 23 (holding that U.S. citizen spouses of U.S. military personnel residing on military bases overseas must be tried by Article III courts with the right to indictment and trial by jury, as opposed to military courts-martial).

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This affront to judicial independence can manifest itself in concrete ways. For example, although President George H. W. Bush appointed Judge Moore to the District Court of the Virgin Islands in 1992 and Moore is willing to continue to serve after his ten-year term expired last June 30,[11] he has not been reappointed.[12] The media have widely attributed Moore's non-reappointment to his rulings against the United States and various influential entities

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Congress also subjects territorial residents and visitors to daily indignities it does not impose on travelers in the continental United States, Alaska, and Hawaii. Specifically, Congress treats all persons traveling from the United States Virgin Islands to the mainland, including United States citizens, as aliens who must satisfy an immigration inspector of their right to be admitted to the continental United States. *See United States v. Pollard*, 209 F. Supp. 2d 525 (D.V.I. 2002), *appeal filed* (3d Cir. July 17, 2002). Further, the Court of Appeals for the Third Circuit has held that the Fourth Amendment, although made applicable to the Virgin Islands by Congress, does not bar the United States from subjecting all travelers from Virgin Islands airports to the continental United States, again including citizens, to warrantless customs border examinations and searches. *See United States v. Hyde*, 37 F.3d 116, 120 (3d Cir. 1994) (holding that *Downes v. Bidwell* gave Congress the right to create a one-way "customs border" between the Virgin Islands and the rest of the United States), *rev'g*, Crim. No. 1993-65, 1993 WL 733094 (D.V.I. Oct. 21, 1993) (Moore, C.J.).

[11] *See* REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 24(a); 48 U.S.C. §§ 1614(a) ("The President shall, by and with the advice and consent of the Senate, appoint two judges for the District Court of the Virgin Islands, who shall hold office for terms of ten years and until their successors are chosen and qualified, unless sooner removed by the President for cause. . . . The salary of a judge of the district court shall be at the rate prescribed for judges of the United States district courts."), 1424b(a) (Guam), 1821(b) (CNMI).

[12] Ironically, knowledge that one will not be reappointed would be almost as sure a guarantee of independence as life tenure.

and persons in the Virgin Islands.[13] Even if Moore's decisions are not the reason he has not been reappointed, the mere appearance that these may be the cause is equally as damaging, as it undermines the public's confidence in the court's impartiality.

II. THE SUPREME COURT DETERMINES WHETHER THE TERRITORIAL JUDGES OF THE DISTRICT COURTS OF GUAM, THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS, AND THE VIRGIN ISLANDS ARE ARTICLE III JUDGES

Contrary to the position argued by petitioners, any impediment to the remaining four territorial judges

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[13] It has been suggested that one of Moore's decisions requiring the United States to comply with the Constitution has rankled the Executive. *See* Michelle Charles & Will Jones, *Reappointment not Certain for District Court Judge*, THE AVIS, Aug. 22, 2002, at 1-2 (implying that Judge Moore may not be reappointed because "[he] may have made U.S. Justice Department officials in Washington unhappy when he recently declared in a ruling that the immigration checkpoints at [the St. Thomas airport] were unconstitutional and the practice was a form of unlawful search and seizure") (referring to *United States v. Pollard*).

The online local newspaper has reported that the Executive's decision not to reappoint Judge Moore may be due to Moore's rulings against the interests of a local business magnate with apparent ties to the White House. *See* Frank J. Jordan, Moore Won't be Nominated for 2d Court Term, ST. THOMAS SOURCE, at http://new.onepaper.com/stthomasvi/?v=d&i=&s=News:Local&p=54411 (Aug. 29, 2002); Editorial, *Politics Appears to Rule over Performance*, ST. THOMAS SOURCE, at http://new.onepaper.com/stthomasvi/?v=d&i=&s=Commentary:Editorials&p=54500 (Aug. 30, 2002); *see also* Frank J. Jordan, *No Reappointment Yet for Federal Judge Moore*, ST. THOMAS SOURCE, at http://new.onepaper.com/ stthomasvi/?v=d&i=&s=News:Local&p=52584 (July 3, 2002).

exercising the judicial power of the United States under Article III has been swept aside by this Court in *Glidden Co. v. Zdanok*. Moreover, *Glidden* stands for the proposition that this Court can declare that the four judges of Guam, the CNMI, and the Virgin Islands exercise the judicial power of the United States with all the protections of Article III of the Constitution.

As discussed in *Glidden*, Congress originally created the Court of Claims and the Court of Customs and Patent Appeals to carry out its legislative functions to pay the debts of the United States and to collect taxes and duties. In 1929, this Court had ruled that the latter was a legislative tribunal created by Congress under its Article I power to lay and collect duties on imports, even though Congress had set no limit on the length of the terms of its judges. *Ex parte Bakelite Corp.*, 279 U.S. 438, 458-59 (1929). Four years later, this Court ruled that the Court of Claims was an Article I court created as a special tribunal to carry out Congress's function of determining claims for money against the United States incident to its power to pay the debts of the federal government, even though its judges held office during good behavior by the grace of Congress. *Williams v. United States*, 289 U.S. 553, 562, 568-69 (1933). In 1953 and 1958, Congress attempted to overrule this Court's *Bakelite* and *Williams* decisions by expressly declaring the Court of Claims and the Court of Customs and Patent Appeals, respectively, to be under Article III.

The very same argument raised by the petitioners here was presented in *Glidden*, namely, that non-Article III judges from these two courts could not be designated to

sit on United States courts constituted under Article III of the Constitution. A majority of five Justices[14] joined in declaring that the judges in question were actually Article III judges, even though they had been appointed under Article I. The plurality of Justices Harlan, Brennan, and Stewart found that the judges had been Article III judges all along because *Bakelite* and *Williams* were wrongly decided, noting that "Congress may not by fiat overturn the constitutional decisions of this Court." *Glidden*, 370 U.S. at 541. The two concurring members, Justice Clark and Chief Justice Warren, reached the same result without disturbing *Bakelite* and *Williams*. Their position was that action by Congress after *Bakelite* and *Williams* not only clarified Congress's intent that the courts be Article III courts, but also expanded the courts' jurisdiction, so that by the time of *Glidden*, "practically all of the court[s'] jurisdiction [was] composed of Article III cases." *Id.* at 586-87 (Clark, J., concurring). Justice Douglas agreed with the plurality that this Court is the "expositor of the meaning of the Constitution, and a congressional enactment in the field of Article III is entitled to no greater weight than in other areas." *Id.* at 602 (Douglas, J., dissenting) (citations omitted).[15]

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[14] Justices Frankfurter and White did not participate in the decision.

[15] Justices Douglas and Black dissented, arguing that the judges and the courts on which they served exercised jurisdiction that far exceeded the constitutional limitations on the judicial power of the United States imposed by Article III. Indeed, the troublesome aspect for all the Justices in *Glidden* was the non-Article III jurisdiction vested in the two courts. Examples of such non-Article III jurisdiction were the power of the Court of Customs and Patent Appeals to review Tariff Commission findings of unfair practices in import trade and the

(Continued on following page)

This Court in *Glidden* explained away Chief Justice Marshall's statement in *Canter* that the "judicial Power of the United States" in Article III cannot be exercised by Congressionally established legislative courts in the territories or elsewhere.

> All the Chief Justice meant, and what the case has ever after been taken to establish, is that in the territories cases and controversies falling within the enumeration of Article III may be heard and decided in courts constituted without regard to the limitations of that article; courts, that is, having judges of limited tenure and entertaining business beyond the range of conventional cases and controversies.

Glidden, 370 U.S. at 544-45 (plurality opinion) (footnote omitted).

This Court readily acknowledged that "[f]ar from being 'incapable of receiving' federal-question jurisdiction, the territorial courts have long exercised a jurisdiction commensurate in this regard with that of the regular federal courts." *Id.* The plurality noted the practical factors affecting the early territories, such as a surplus of federal judges once a territory became a state and the isolation of the territorial governments from Washington, D.C., that reduced the urgency for territorial federal

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congressional reference jurisdiction given the Court of Claims. Another concern was whether cases in which the United States was a defendant and would be immune from execution on a judgment rendered against it were "justiciable" under Article III. *See Glidden*, 370 U.S. at 562-71 (plurality opinion); *id.* at 597-98 (Douglas, J., dissenting). Such concerns have no relevance to the four territorial judges.

judges to enjoy Article III independence from Congress. Given modern communications and the evolution of the jurisdiction of the territorial district judges to that of the Article III jurisdiction of a United States district court, these practical difficulties no longer present any basis for denying tenure during good behavior to the territorial judges.

The "same confluence of practical considerations that dictated the result in *Canter*" also dictated more flexibility in dealing with the governance and application of Article III to the unincorporated territories outside the mainland. "The touchstone of decision in all these cases has been the need to exercise the jurisdiction then and there and for a transitory period. . . . When the peculiar reasons justifying investiture of judges with limited tenure have not been present, the *Canter* holding has not been deemed controlling." *Id.* at 547-48 (plurality) (citing *O'Donoghue v. United States*, 289 U.S. 516, at 536-39 (1933) (other citations omitted)).

The federal judges and courts in the unincorporated territories of the Virgin Islands, Guam, and the CNMI are no less permanent than the judges and courts involved in *Glidden*, the United States District Court and Court of Appeals in the District of Columbia, or even an Article III court in any of the fifty states. The analysis may be slightly different but the result is the same. A United States district court established in a State under Article III can be abolished by legislation in a later Congress, for Article III itself only vests the judicial power of the United States "in such inferior Courts as Congress may from time to time ordain and establish." As this Court noted about the permanency of the Court of Claims and Court of Customs and Patent Appeals, "the threat thus facing their

independence is not in kind or effect different from that sustained by all inferior [Article III] federal courts." *Id.* at 551 (plurality opinion).

III. THE TERRITORIAL JUDGES ARE *DE FACTO* ARTICLE III JUDGES WHO PRESENTLY EXERCISE ARTICLE III JUDICIAL POWER

The judge of the District Court of Guam, the judges of the District Court of the Virgin Islands, and the judge of the District Court of the Northern Mariana Islands all exercise "the jurisdiction of a District Court of the United States, including, but not limited to, the diversity jurisdiction provided for in section 1332 of title 28, United States Code, and that of a bankruptcy court of the United States." 48 U.S.C. §§ 1421(a) (Guam), 1612(a)(VI), 1822(a) (CNMI).[16]

[16] Only the judges of the District Court of the Virgin Islands perform any appellate role over a local court. *See* REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 23A(a), 48 U.S.C. § 1613a(a). Since the U.S. District Court for the District of Columbia exercised both federal and general local jurisdiction at the time the Supreme Court decided it was an Article III court, *see O'Donoghue*, 289 U.S. at 545-48, there is no reason after *Glidden* that the U.S. District Court for the District of the Virgin Islands cannot continue to exercise this role. The Virgin Islands territorial judges also have a residual or "supplemental" concurrent jurisdiction over those local criminal offenses that grow out of conduct that also offends the federal criminal law. *See* REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 22(c), 48 U.S.C. § 1612(c). There is no reason for this anachronistic concurrent jurisdiction to continue, and its elimination would further the autonomy of both the local and federal trial courts in the Virgin Islands. Most importantly, Congress has vested no executive, administrative, or legislative powers in the judges of the District Court of the Virgin Islands or in any of the other territorial judges. Hence there is even less reason for concern here than there was in

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According to the criteria collectively established by all seven of the Justices who participated in *Glidden*, the territorial judges are *de facto* Article III judges. As required by the plurality, the territorial judges operate under establishing legislation that incorporates the limitations of Article III. Their business is the federal business specified in Article III.

> [W]hether a tribunal is to be recognized as one created under Article III depends basically upon whether its establishing legislation complies with the limitations of that article; whether, in other words, its business is the federal business there specified and its judges and judgments are allowed the independence there expressly or impliedly made requisite.

Glidden, 370 U.S. at 552 (plurality opinion of Harlan, Brennan and Stewart, JJ.).

O'Donoghue, as the residual functions the territorial judges exercise are obviously judicial in nature.

The judges of the territorial district courts would continue to exercise a unique kind of federal jurisdiction, e.g., "exclusive jurisdiction over all criminal and civil proceedings in the Virgin Islands with respect to the [U.S.] income tax laws applicable to the Virgin Islands, . . . except [those] enacted by the legislature of the Virgin Islands." REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 22(a), 48 U.S.C. § 1612(a); *cf.* ORG. ACT OF GUAM, 48 U.S.C. § 1421i(a)-(h); COVENANT TO ESTABLISH COMMONWEALTH OF NORTHERN MARIANA ISLANDS art. VI, *reprinted as note to* 48 U.S.C. § 1801. Being federal in nature, this jurisdiction would remain exclusively in the U.S. district courts for the Virgin Islands, Guam, and the CNMI. *See, e.g., Danbury, Inc. v. Olive,* 820 F.2d 618, 622 (3d Cir. 1987) ("This proviso implements Congress's stated goal of depositing proceeds from the U.S. income tax into the treasury of the Virgin Islands.").

As required by the concurrence, the territorial judges exercise jurisdiction only over justiciable matters, issue final judgments, and are judges appointed by the President with consent of the Senate.

> [J]urisdiction over justiciable matters, issuance of final judgments, judges appointed by the President with consent of the Senate. . . . And . . . [an] unequivocal[ ] express[ion of] Congress' intent that [the court] . . . should be an Article III court, thereby irrevocably establishing life tenure and irreducible salaries for its judges.

Id. at 586-87 (Clark, J., concurring).

The territorial judges even satisfy the criteria of the dissent, in that they have the power to adjudicate any cause brought in a suit filed according to the regular course of judicial procedure and the power to enter a judgment and enforce it. They submit to no revisory or appellate power in the executive or legislative branches of government.

> [D]ecisions of this Court clearly condition the power to take cognizance of any cause upon the existence of a suit instituted according to the regular course of judicial procedure, the power to pronounce a judgment and carry it into effect between persons and parties who bring a case before it for decision, [and] the absence of revisory or appellate power in any other branch of Government. . . .

Id. at 601 n.6 (Douglas, J., dissenting) (citations omitted).

The dissenting Justices in *Glidden* would require the appointing President to know that these judges would be exercising all the powers of an Article III court, for "[a]n

appointment is made by the President and confirmed by the Senate in light of the duties of the particular office," and "[f]ederal judges named to Article III courts are picked in light of the functions entrusted to them." *Id.* at 603, 604.

> Judges who do not perform Article III functions, who do not enjoy constitutional tenure and whose salaries are not constitutionally protected against diminution during their term of office cannot be Article III judges.
>
> Judges who perform 'judicial' functions on Article I courts do not adjudicate 'cases' or 'controversies' in the sense of Article III. They are not bound by the requirements of the Seventh Amendment concerning trial by jury.
>
> Judges who sit on Article I courts are chosen for administrative or allied skills, not for their qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and ex post facto laws, were designed. Judges who might be confirmed for an Article I court might never pass muster for the onerous and life-or-death duties of Article III judges.

Id. at 606.

The territorial judges meet all these criteria, with the exception of life tenure and protected compensation. They all have been appointed by the President to exercise Article III authority and have been performing the duties of Article III judges with the full and equivalent jurisdiction of Article III United States district courts. Each appointing President knew that these judges would be

exercising all the powers of an Article III court and chose them for their "qualifications to sit in cases involving the vast interests of life, liberty, or property for whose protection the Bill of Rights and the other guarantees in the main body of the Constitution, including the ban on bills of attainder and ex post facto laws, were designed." The respective appointing Presidents selected them for their qualifications to exercise the Article III power of the United States, regardless of the length of their terms.[17] The present judges of the territorial district courts have always adjudicated the same Article III "cases" and "controversies" that any and every United States district court judge presides over in the fifty states. They also are statutorily bound by the requirements of the Seventh Amendment concerning trial by jury.

The four territorial judges were selected, investigated, and nominated by the President to perform the identical functions performed by any Article III judge on any United States District Court. They were subjected to the same in-depth background investigation by the Federal Bureau of Investigation, evaluated by the same committee of the American Bar Association, and investigated by the same Senate Judiciary Committee. They were confirmed by the Senate on the understanding that each one would be exercising the full powers of Article III judges, and they

[17] During their terms, the incumbent judges may be removed from office by the President only "for cause," e.g., REV. ORG. ACT OF 1954 (VIRGIN ISLANDS) § 24(a), 48 U.S.C. § 1614(a), which guarantees due process, just as an Article III judge can only be removed by the impeachment process, U.S. CONST. art. II, § 4.

have been exercising this authority during their entire tenure as territorial district judges.

The territorial judges are Article III judges in everything but name. As the arbiter of Article III, this Court can declare these *de facto* Article III judges to be *de jure* United States district judges by overruling the *Insular Cases*' misguided finding that Article III does not apply to the unincorporated territories or possessions. This declaration will simply recognize that these judges were nominated and confirmed to perform the duties of Article III judges on courts with the full and equivalent jurisdiction of courts established under the judicial power of the United States, just as Congress "renounc[ed] its power to terminate the functions or reduce the tenure or salary of the judges of the courts" at issue in *Glidden*. 370 U.S. at 589 (Clark, J., concurring). It follows that Congress constitutionally cannot anoint the territorial judges with the judicial power of the United States without also cloaking them with the independence Article III requires.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Ninth Circuit should be upheld because territorial judge Alex Munson exercises the judicial power of the United States pursuant to Article III of the Constitution.

Respectfully submitted,

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February 21, 2003.

Supreme Court, U.S.
FILED
NOV 1 2002
CLERK

ORIGINAL

No. 02-5034

SUPREME COURT OF THE UNITED STATES

October Term, 2001

TUYET MAI THI PHAN,

Petitioner,

Vs.

UNITED STATES OF AMERICA and
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Respondents.

On Petition for Writ of Certiorari
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for the Ninth Circuit

REPLY BRIEF

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REPLY BRIEF

REPLY TO NEW POINTS RAISED IN BRIEF IN OPPOSITION

I

A pure legal question may be appropriate for the Court's resolution, notwithstanding it was not addressed by the court of appeals. (Nixon v. Fitzgerald, 457

U.S. 731, 743 n. 23 (1982)). Whether the Ninth Circuit's judgment was vitiated by the participation of a non-Art. III judge is just such a question. Phan's petition seeks the vindication of a right. At the same time, it invokes an exercise of the Court's supervisory powers. Insofar as it invokes an exercise of the Court's supervisory powers, that the issue presented for review was not raised in the court of appeals should be of no particular consequence. The Congress has authorized no judge other than an Art. III judge. The Ninth Circuit is designating non-Art. III judges. Clearly the practice should cease. Does the government suggest that the practice continue?

II

The government cites two cases in support of the proposition that Phan waived any right to a panel composed entirely of Art. III judges "by failing to object." (Brief for the United States in Opposition 5). Both cases, however, entail much more than a mere failure to object. The waiver in *Peretz v. United States*, 501 U.S. 923 (1991), was unequivocal:

> At a pretrial conference attended by both petitioner and his counsel, the District Judge asked if there was "[a]ny objection to picking the jury before a magistrate? App. 2. Petitioner's counsel responded: "I would love the opportunity." Ibid. Immediately before the jury selection commenced, the Magistrate asked for, and received, assurances from counsel for petitioner and from counsel for his codefendant that she had their clients' consent to proceed with the jury selection...
>
> ...
>
> ...[P]etitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it.

(501 U.S. at 925, 932 (footnote omitted)). So was the waiver in *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986), unequivocal:

> The instant dispute arose in February 1980, when respondents Schor and Mortgage Services of America, Inc., invoked the CFTC's reparations jurisdiction by filing complaints against petitioner ContiCommodity Services, Inc. (Conti), a commodity futures broker, and Richard L. Sandor, a Conti employee...
>
> Before receiving notice that Schor had commenced the reparations proceeding, Conti had filed a diversity action in Federal District Court to recover the debit balance...Schor...moved on two separate occasions to dismiss or stay the District Court action, arguing that the continuation of the federal action would be a waste of judicial resources and an undue burden on the litigants in view of the fact that "[t]he reparations proceedings...will fully...resolve and adjudicate all the rights of the parties to this action with respect to the transactions which are the subject matter of this action." App. 13. See also *id.*, at 19.
>
> ...
>
> ...Schor indisputably waived any right he may have possessed to the full trial of Conti's counterclaim before an Article III court. Schor expressly demanded that Conti proceed on its counterclaim in the reparations proceeding rather than before the District Court, See App. 13, 19...

(478 U.S. at 837-38, 849 (footnote omitted)).

III

The government contends that "it is debatable whether the separation of powers principles embodied in Article III apply to the residents of the United States territories." (Brief for the United States in Opposition 6). But how is residency relevant? The Ninth Circuit is not a territorial court. The separation of powers principles embodies in Art. III are extended to the residents of Guam by 28 U.S.C. §1291: "The court of

appeals...shall have jurisdiction of appeals from all final decisions of the District Court of Guam..."

IV

Phan's claim is not subject to the application of the de facto officer doctrine. Phan's challenge is constitutional. The issue presented for review is constitutional: "Was the Ninth Circuit's judgment vitiated by the participation of a non-Art III judge?" (Petition for Writ of Certiorari). Phan's argument is constitutional: "This Court should be reluctant to sanction the participation of a non-Art. III judge. (Cf. *Guam v. Olsen*, 431, U.S. 195, 201 (1977)('we should be reluctant without a clear signal from Congress to conclude that it intended to allow the Guam Legislature to foreclose appellate review by Art. III courts, including this Court, of decisions of territorial courts in cases that may turn on questions of federal law')). (Petition for Writ of Certiorari 5).

> In *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), we declined to invoke the de facto officer doctrine in order to avoid deciding a question arising under Article III of the Constitution, saying that the cases in which we had relied on that doctrine did not involve "basic constitutional protections designed in part for the benefit of litigants." Id. at 536 (plurality opinion).

(*Ryder v. United States*, 515 U.S. 177, 182 (1995)).

V

Of course the error affected Phan's substantial rights. Phan does not complain of an Art. III judge's *absence*. She complains of a non-Art. III judge's *participation*.

> Under Title XXIX, Government Code of Guam, section 28005, the disbarment or suspension of attorney's practicing law in Guam is vested exclusively in the District Court of Guam, consisting of a single judge.

> The proceedings which occurred at the court hearing indicate that the district judge understood this, and that he did not intend that the three judges then on the bench constitute the Appellate Division. He also made it clear that he "* * * assumed responsibility for any decision arrived at. * * *"
>
> Nevertheless two judges of the Island Court of Guam, neither of whom was attached to the personal staff of the district judge, were on the bench with the district judge, and at his request. They were not there merely as observers, or out of courtesy, but to assist the district judge, including the evaluation of evidence. Whether they actually did render any assistance to the district judge cannot be determined from this record; we must therefore assume that they did.
>
> There is no applicable statute, regulation or rule of court which contemplates such a procedure...
>
> In our opinion, Webster was entitled to have the factual issues involved in these proceedings adjudicated, and the form of order to be entered determined, by the district judge without the assistance of persons not connected with his personal staff.

(*In re Webster*, 363 F.2d 837, 839 (9th 1966)).

CONCLUSION

The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory powers. The panel which heard and determined Phan's appeal included a non-Art. III judge. Because of this, the petition for writ of certiorari should be granted.

Dated, Hagåtña, Guam, October 30, 2002.

Respectfully submitted,

RAWLEN M T MANTANONA
Attorney for Petitioner

No. 02-5034

SUPREME COURT OF THE UNITED STATES

October Term, 2001

TUYET MAI THI PHAN,

Petitioner,

Vs.

UNITED STATES OF AMERICA and
KHANH PHUONG NGUYEN,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

DECLARATION OF SERVICE OF
REPLY BRIEF

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SUPREME COURT, U.S.

I, Francesrose T. Tydingco, declare that I am a secretary employed in the office of Rawlen M T Mantanona, Esq., counsel of record for Petitioner Tuyet Mai Thi Phan, and that on October 30, 2002, a copy of the Reply Brief in the above-entitled cause was mailed, by depositing it with the United States Postal Service at Hagåtña, Guam, with first-class postage prepaid, to each of the following:

1. The Honorable Theodore Bevry Olson, Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, DC 20530-0001, telephone (202) 514-2217, counsel for Respondent United States of America herein; and

2. Howard Trapp, Esq., 200 Saylor Building, 139 Chalan Santo Papa, Hagåtña, Guam 96910, counsel for Respondent Khanh Phuong Nguyen.

I further declare that all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Dated this 30th day of October, 2002, in Hagåtña, Guam.

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